SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73 - 1772

SOUTHERN CALIFORNIA GAS COMPANY,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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May 24, 1974.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this action on January 21, 1974, affirming in certain respects the orders of the Federal Power Commission (Commission).

Opinions Below.

Copies of the judgment and opinion of the Court of Appeals, styled *American Smelting and Refining Company v. Federal Power Commission*, are appended hereto as Appendix A. The opinion of the Court of Appeals is reported at 492 F.2d .....

Copies of the Commission's Opinion No. 634, issued October 31, 1972, entitled, *Opinion and Order Prescribing Interim Emergency Curtailment Plan;* and its

Opinion No. 634-A, issued December 15, 1972, entitled, *Opinion and Order Clarifying Opinion, Denying Motions for Stay, and Denying Rehearing*, which were the subject of the opinion of the Court of Appeals, are appended hereto as Appendix B. These orders are reported at 48 FPC 931 and 48 FPC ..... (1972), respectively.

Jurisdiction.

The judgment of the Court of Appeals for the District of Columbia Circuit was entered January 21, 1974. The Court of Appeals denied Petitioner's petition for rehearing, *en banc*, on February 28, 1974. A copy of the order of the Court denying the petition for rehearing, *en banc*, is appended as Appendix C. The jurisdiction of the Court to review the judgment in question by writ of certiorari is conferred by 28 U.S.C. §1254(1).

Question Presented.

May the Commission in prescribing a curtailment plan, once it has insured service to human-needs customers, ignore the historical contractual relationship between the pipeline company and its customers, which it has previously approved in issuing certificates of public convenience and necessity, and in the absence of substantial evidence in the record abrogate such contracts in derogation of the due process guarantee of the Fifth Amendment and the Natural Gas Act of 1938?

Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the Constitution of the United States provides in part:

> "No person shall . . . be deprived of . . . property, without due process of law. . . ."

This case also involves Sections 4, 5 and 19(b) of the Natural Gas Act of 1938, 52 Stat. 822, 823 and 831, as amended, 15 U.S.C. §§717c, 717d, and 717r (b), which are set forth in full in Appendix D.

Statement.

California was self-sufficient in gas supplies through the end of World War II. During World War II, due in part to losses at sea of oil tankers sunk by German U-boats, a need developed for and methods were found too, to develop large diameter pipelines for the transmission of oil over vast distances. The "big inch" pipeline was accordingly built. The same technology developed to build oil pipelines could be, and thereafter was, applied to pipelines to transport natural gas. Another outgrowth of World War II was that many Americans were exposed to the California way of life; therefore, a sufficient number decided to move to California after the war, and there occurred and has continued to occur such a tremendous surge in population that today California is the most populous state in the United States.

Shortly after World War II, it became clear that California could no longer be self-sufficient in gas supplies, and Southern California Gas Company (SoCal), petitioner herein, contracted to buy gas from El Paso Natural Gas Company (El Paso). El Paso built a pipeline system which to this day has brought gas from the general area of the Permian Basin in Texas and New Mexico to Blythe, California, where it is sold to SoCal. The building of the pipeline system by El Paso, and the sale of this gas by El Paso to SoCal, required public hearings and a close scrutiny by the Commission before it issued its required approvals. In

1946, the Commission issued its first certificate of public convenience and necessity in Docket No. G-655 for El Paso to sell to SoCal 177 million cubic feet of natural gas. The population of the service territory to which SoCal is providing gas service has expanded to the point of presently containing a population of some 11 million humans. Stated differently, we are responsible for supplying adequate gas service through one out of every six gas meters in the United States. For that reason, we have been necessarily diligent in contracting for adequate gas supplies to meet our customers' needs. This has required constant additions to our out-of-state gas supply, and today some 85% of our gas supply originates out of state. Each of these expansions has required passing the very close scrutiny of the Commission, and, in fact, in the case of sales by El Paso to SoCal such gas supply projects have required twenty-eight (28) years of Commission approvals so that the Commission on twenty-one (21) different occasions has approved the sales of gas as being "in the public interest" and meeting all the tests of "public convenience and necessity".

The point we wish to emphasize here is that it has not been a cavalier, offhand expression of approval, but has been the thorough probing and exhaustive analysis of the issues which resulted in each Commission approval being obtained. In fact, one of the proceedings in the last decade consumed 168 days of hearings before the Commission, *Transwestern Pipeline Company*, 36 FPC 176 (1966), and resulted in a decision of affirmance of the Commission's decision by the United States Court of Appeals for the Third Circuit. *Southern California Edison Co. v. FPC*, 387 F.2d 619 (1967).

Unfortunately, because of the energy shortage it has now been several years since we have been able to contract with El Paso for additional gas supplies, as would have been normal under prior history, because El Paso, itself, has not been able to contract for additional gas supplies. The problem of not being able to contract for additional gas supplies has now been compounded by the instant proceeding in which the Commission has held that those supplies, so laboriously contracted for in the past and which commenced to flow only after the most searching scrutiny by the Commission in meeting the statutory requirements, may now be taken away from California, and a preferred position be given to customers east of California upon the fictitious pretense that prior official actions by the Commission have now resulted in "unlawful discrimination" against east-of-California customers. One has an instant empathy for the character in *Alice in Wonderland* when one examines the tortuous path that the Commission has followed in the instant proceeding.

This is particularly true when one recognizes that the paternity to which the Commission attributes its decision in this proceeding is this Court's decision in *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). As a formal "caveat", may we state, "hopefully", had a better exposition been given as to the issues involved in that proceeding, there may have been some, at least, supplied modification of the strong views promised by this Court in that decision. But, we accept the fact that the prior decision exists and is "the law of the land". We do not herein urge this Court to reverse its prior decision. In fact, we are in the fortunate position of advocating that this Court affirm its decision, for if this Court remains true

to its prior decision then such position requires a reversal of the Commission in this proceeding.

By its issuance of Opinion Nos. 634 and 634-A, the Commission in violation of the Fifth Amendment and in derogation of the Natural Gas Act set aside the longstanding contractual relationship which has existed between El Paso and SoCal. The validity of this contractual relationship has been passed upon many times over nearly a quarter of a century [R. 13919]. SoCal is not challenging the Commission's authority as set forth in *Louisiana Power & Light Co., supra,* to establish an orderly curtailment involving both direct sales and sales for resale; however, SoCal is challenging any claim of authority by the Commission that once it has satisfied any need for an emergency curtailment plan to satisfy the demands of human-needs customers that it may go far beyond the teaching of *Louisiana Power & Light* and reallocate the available gas supply among the industrial customers without any regard for the historical contractual relationships which have been relied upon by the customers on El Paso's system.

This Court, having decided that the issues in *Louisiana Power & Light* were of significant importance of its consideration, is now being petitioned for the first time to rule upon the fashion in which its decision in *Louisiana Power & Light* is being administered by the Commission and by the Court of Appeals for the District of Columbia Circuit. In an era of increasing shortages of natural gas supply, it is critical that the teachings of this Court be made clear and that an abuse of the Commission's authority, based upon an erroneous interpretation of those teachings, be reversed.

El Paso, on July 6, 1971, filed pursuant to Section 4(d) of the Natural Gas Act, 15 U.S.C. §717c(d) (1963), revised tariff sheets proposing changes in its then effective FPC Gas Tariff which would result in the reallocation of both its gas supply and capacity on a permanent basis. El Paso proposed that the changes become effective on August 6, 1971 [R. 9654-9709].

The Commission in its order issued August 5, 1971, suspended the effectiveness of the proposed changes until January 6, 1971, and established hearing procedures [R. 11674-11679]. Hearings commenced on November 9, 1971, and continued intermittently until May 18, 1972 [R. 1-6912].

Subsequent to the conclusion of such hearings, and prior to any initial decision by the Presiding Judge, on August 17, 1972, El Paso, having deferred placing its proposed tariff sheets into effect, filed a motion requesting the Commission to issue an order prescribing interim emergency service rules and regulations to govern its deliveries of natural gas [R. 11928-11970]. El Paso alleged that studies completed after the hearings showed a need to commence curtailments in the fall of 1972, and further alleged that if the Commission accepted the FPC Staff opinion that El Paso's proposed plan was in fact a permanent alteration and abandonment of service without statutory authorization under Section 7(b) of the Natural Gas Act, 15 U.S.C. §717f (b) (1963), any action by El Paso to implement its proposed plan could subject El Paso to statutory penalties and civil actions for damages [R. 11932-11935].

The Commission, on September 1, 1972, ordered limited reopening of the record [R. 12225-12229], and hearings were held from September 12 until Sep-

tember 25, 1972, for the purpose of receiving evidence on the need for an interim curtailment plan and what form of plan, if any, should be adopted [R. 6913-8441]. The Commission, on October 31, 1972, issued its Opinion No. 634.

The Commission's Opinion No. 634 in complete disregard for the historical service agreements between El Paso and SoCal prescribed interim service rules and regulations to implement the curtailment of deliveries of natural gas on El Paso's Southern Division System for the period November 1, 1972, until October 31, 1973, or until a permanent curtailment provision is approved, whichever should occur earlier [R. 13366-13368]. On October 18, 1973, however, the Commission extended the operation of the interim plan pending further action on a permanent plan, and on January 21, 1974, the Court of Appeals in its opinion in this proceeding stated that the Commission could continue the interim plan in effect for a reasonable period of time pending its decision regarding the matters remanded for further consideration. The interim plan is still in effect as of the date of this petition, and the historical agreements between El Paso and SoCal have been set aside unlawfully and unjustly.

Since the policies which the Commission stated in Opinion No. 634 result in drastic adverse consequences on SoCal's ability to meet its customers' needs, SoCal filed an application for rehearing with the Commission on November 22, 1972, pursuant to Section 19(a) of the Natural Gas Act, 15 U.S.C. §717r(a) (1963) and Section 1.34 of the Commission's Rules of Practice and Procedure, 18 C.F.R., Subchapter A, Part 1 [R. 13398-13421]. Therein, SoCal sought rehearing of sev-

eral specific errors made by the Commission in Opinion No. 634 and accompanying order [R. 13399-13400].

In Opinion No. 634-A, issued December 15, 1972, the Commission clarified Opinion No. 634 in certain respects and denied rehearing [R. 13746-13754]. The Commission failed to remedy the several apparent errors enumerated and discussed by SoCal in its application for rehearing [R. 13399-13400].

In the light of the Commission's failure to correct the errors made in Opinion Nos. 634 and 634-A, SoCal, on December 29, 1972, filed a petition for review of Opinion Nos. 634 and 634-A and accompanying orders in the United States Court of Appeals for the District of Columbia Circuit.

On January 21, 1974, the Court of Appeals issued its decision in this proceeding entitled, *American Smelting and Refining Company v. Federal Power Commission*. Therein, the Court of Appeals concluded that the Commission has the authority to implement interim curtailment plans pending final approval of permanent tariff provisions but remanded this matter to the Commission because of certain defects in the orders under review (Slip Op. p. 15). On the issue of contract rights (Slip Op. pp. 18-21), the Court stated that the Commission is not bound by agreements among parties subject to its jurisdiction and having found the historical contracts to be discriminatory the Commission has the authority to promulgate substitute procedures (Slip Op. p. 19). The Court of Appeals on February 28, 1974, denied SoCal's petition for rehearing.

ARGUMENT.

I.

The Commission's Orders, Here Under Review, Violate the Constitutional Right to Property Acquired by the Prior Certification of Sales to Southern California Gas Company.

The prior certificates issued by this Commission gave to SoCal a vested right to the contract volumes set forth in the contracts approved by its certification. The present orders in Opinion Nos. 634 and 634-A constitute an unconstitutional deprivation of that right [R. 13366-13368, 13751].

While the Court of Appeals has determined (Slip Op. p. 19) that the Commission has the authority to override contractual arrangements among parties subject to its jurisdiction, the Court has failed to give sufficient weight to the fact that the Commission has, in effect, passed upon the validity of these contracts twenty-one (21) times over nearly a quarter of a century. Therefore, the Commission's action is not merely a determination to set aside contractual arrangements among the parties; it is an unjustified reversal by the Commission of its prior action in certificating sales based upon such contracts. Having satisfied the need, if any, for an emergency curtailment plan to meet the demands of the human-needs customers, the Commission has no authority to go further and reallocate the available gas supply among the industrial customers without any regard for the historical contractual relationships which have been entered into by the customers on El Paso's system.

SoCal is not challenging the Commission's authority as set forth in *Federal Power Commission v. Louisiana*

Power & Light Co., 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972), to establish an orderly curtailment involving both direct sales and sales for resale; however, SoCal is challenging any claim of authority by the Commission that once it has satisfied any need for an emergency curtailment plan to satisfy the demands of human-needs customers that it may go further and reallocate the available gas supply among the industrial customers without any regard for the historical contractual relationships which have been relied upon by the parties on El Paso's system.

By setting aside the contracts involved herein, the validity of which the Commission has passed upon on twenty-one (21) prior occasions [R. 13919], the Commission has unlawfully extended its authority to act in a curtailment situation far beyond that envisioned by this Court in *Louisiana Power & Light*. In that case (406 U.S. at 632) this honorable Court in describing the Commission's authority to establish curtailment plans spoke only in terms protecting human-needs customers, such as schools, hospitals and homes, from being burdened with the full impact of curtailment in the event direct customers were found to be exempt from curtailment. In the instant proceeding, the Commission in its reallocation of gas supplies has gone far beyond anything necessary for the protection of such human-needs customers and has unreasonably and unjustly set forth a system of priorities which results in the shifting of gas from one industrial customer to another in complete disregard for the historical contractual arrangements [R. 13931-13932]. This Court did not manifest any intention in *Louisiana Power & Light* which warrants the Commission in riding roughshod over the natural gas industry by cavalierly dis-

regarding and destroying the contractual arrangements between the pipeline and its customers. No reason can be given which supports such far sweeping and destructive action. The Commission's action severely threatens the very basis of the natural gas industry by destroying the validity of the contractual relationships upon which it has grown and prospered and by seriously undermining confidence in prior Commission actions upon which reliance has been placed by the natural gas industry.

SoCal has relied upon these contracts with El Paso, and the following is a history of the Commission's certification of deliveries to SoCal in its relationship with El Paso [R. 13919]:

Volumes—M²cfd at 14.73 psia
El Paso

Increment	Cumulative	F.P.C. Docket Date	Increment Certificated
177.0	177.0	G-655	5-31-46
131.5	308.5	G-655	5-31-46
60.7	369.2	G-1051	9-10-48
40.5	409.7	G-1051	9-10-48
151.7	561.4	G-1631	6-19-52
50.6	612.0	G-2106	6-29-53
101.1	713.1	G-2106	6-29-53
50.6	763.7	G-8940	11-25-55
50.6	814.3	G-8940	11-25-55
25.3	839.6	G-8940	11-25-55
25.3	864.9	G-8940	11-25-55
25.2	890.1	G-8940	11-25-55
75.9	966.0	G-10499	12-19-56
75.9	1041.9	G-11797	3-26-58
101.1	1143.0	G-12580	11-27-59
131.5	1274.5	CP64-76	7-26-66
121.4	1395.9	CP64-76	7-26-66
104.1	1500.0	CP67-217	10-30-68
50.0	1550.0	CP67-217	10-30-68
100.0	1650.0	CP69-348	3-13-70
100.0	1750.0	CP-69-348	3-13-70

The agreements entered into by El Paso's customers clearly provided that any curtailment on the El Paso system was to be borne by the east-of-California (EOC) customers. El Paso, through its witness O'Toole [R. 6996], stated that under its then current tariffs, gas sales agreements and past operating practices, the last volumes to be curtailed, if any, were to be those which have been contracted for delivery to the California customers. Similar testimony concerning El Paso's historical practices and contractual relationships was provided by El Paso's witness Petty [R. 27]. More importantly, the Commission also determined that the then existing tariff provisions and service agreements also would protect California from curtailment during a supply shortage [R. 13361, 13364].

The California parties in their bargaining sought from El Paso a different relationship than that which was sought by the EOC customers. No undue discrimination has resulted from the differences in the contracts entered into by El Paso with its customers located in California or with its customers located east of California. While the California parties were assured of a continuing supply of natural gas at a specified volume, the EOC customers entered into contracts which would supply their full and growing requirements [R. 25, 1637]. In return for the assurance of a firm specified quantity of gas, SoCal agreed to pay El Paso a minimum billing charge equivalent to 91% of the sum of the maximum contracted daily demands in effect each day during each year [Item by Reference

F, Tab 26, p. 3, R. 386]. This means that in the event that SoCal is not capable of taking such amount of gas, it must pay for it anyway.[1] EOC customers, on the other hand, are not burdened by such a provision. In addition, the California parties are served by El Paso under a two-part rate which results in SoCal paying more per Mcf if it takes less than its full firm contract quantity, while the EOC customers are served under a one-part rate and pay a single rate for the quantity of gas actually received [R. 26]. The California parties have therefore undertaken additional obligations in their relationship with El Paso in return for the assurance that they would receive a firm supply of natural gas as opposed to the EOC customers who have entered into full requirements contracts to meet their growing needs and who have assumed the risk of a supply shortage.

The California parties being mindful of the human-needs requirements of the EOC customers agreed to help meet such requirements in the SoCal/PGandE proposal [R. 7065-7068]. SoCal, while willing to help the EOC customers meet their human-needs requirements and recognizing the authority of the Commission to prescribe an orderly curtailment to meet such needs as upheld by this Court in *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 92 S.

[1]This provision undertaken by the California parties guarantees that El Paso will recover 91% of its fixed costs in providing gas to the California customers, and this guarantee has in large part made it possible for El Paso to finance its system-wide expansion improving service to all of its customers.

Ct. 1827, 32 L.Ed.2d 369 (1972), opposes the unreasonable claim of authority by the Commission that once it has satisfied any human-need requirements that it may then set aside longstanding contracts in order to shift gas from one industrial customer to another. There is no basis which can be given to justify such a result. The gas which is not delivered to California will be used elsewhere on El Paso's system by an EOC industrial customer, which has, under the terms of its agreement with El Paso, agreed to interruption in the event of a supply shortage; not 1 Mcf less will be burned. The Commission's order of priorities in Opinion Nos. 634 and 634-A does not result in the conservation of gas on the El Paso system but results rather in an unwarranted redistribution far beyond that required to protect human-needs consumers.

The shifting of gas from one industrial group to another is arbitrary and unreasonable and serves no worthwhile purpose in relation to the Commission's objective to assure maximum high priority use of natural gas [R. 13361].

Since SoCal has relied upon its contracts with El Paso in the development of the SoCal system for the service of its customers and has entered into contracts for the service of its customers, the sweeping away of the contracts creates great difficulty in its ability to meet its commitments.

The Commission by setting aside the longstanding contractual relationship between SoCal and El Paso and the Court of Appeals by affirming such action

have failed to recognize the fact that the Natural Gas Act, 15 U.S.C. §§717, *et seq.* (1963), was not intended to grant the Commission such sweeping power. As stated by Justice Harlan in *United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338-339, 76 S.Ct. 373, 379-380, 100 L.Ed. 373, 383-384 (1955):

> In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts.

After contrasting the Commission's function with that of another federal regulatory body, he concluded:

> On the other hand, only a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. Recognizing the need these circumstances create for individual arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

The fact that the Natural Gas Act is premised upon a continuing system of private contracting was also recognized by this Court in *Permian Basin Area Rate Cases*, 390 U.S. 747, 784, 88 S.Ct. 1344, 1381, 20 L.Ed.2d 312, 346 (1968).

The Commission has also failed to make the necessary findings that the contract terms which it is abrogating are not in the public interest. It has failed to give clear reasons why, once human-needs requirements have been satisfied, the available gas supply should not be allocated in accordance with the historical agreements. No "undue" preference can result from the recognition of such contractual arrangements and the allocation of industrial gas in accordance with such arrangements, *International Paper Co. v. FPC*, 476 F.2d 121 (5th Cir. 1973). The Court of Appeals has erred in sustaining the Commission's decision in this regard.

II.

The Commission Lacked Substantial Evidence in the Record Upon Which It Could Rely in Order to Abrogate the SoCal-El Paso Contracts.

The Court of Appeals erred in its determination that the Commission had substantial evidence in the record upon which it could rely in abrogating the SoCal-El Paso contracts. The Commission had no substantial evidence upon which it could conclude that there was any real danger to the residential and commercial customers east of California.

Schedule 1 of Exhibit 237 [R. 9545-9562], sponsored by El Paso's witness, O'Toole, sets forth the curtailment which could occur during the interim period and the possible impact of such curtailment upon the human-needs customers under the historical tariff provisions [R. 7490-7491]. From Exhibit 237 it is readily apparent that the only curtailment of commercial cus-

tomers on an average day would have been as follows:

(A) In December, 1972, the City of Mountainair would have been curtailed 1 Mcfd;

(B) In December, 1972, the Western Gas Interstate Company would have been curtailed 71 Mcfd; and

(C) In January, 1973, the City of Mesa would have been curtailed 2,151 Mcfd. [R. 7509-7510].

During the same period in which curtailment of commercial customers occurs on an average day,[2] *over 95% of the industrial requirements of El Paso's east-of-California resale customers would have been met* [R. 7510-7511]. No other curtailment of commercial users was projected on an average day basis for the interim period [R. 7511-7512]. Such curtailments of commercial customers would have occurred because such customers had, on an average day, exceeded their currently effective service agreements with El Paso [R. 7511-7512].

Indeed the Court of Appeals concluded (Slip Op. p. 28):

> "There is no indication that residential customers would actually have been curtailed at all. It is possible that the estimated 25% cutback of residential-commercial service would have been completely absorbed by the commercial sector. Consequently, there is no substantial evidence to sustain the finding that EOC residents would 'probably' or 'undoubtedly' have been curtailed under the old plan."

---

[2]There is no evidence in this proceeding as to the exact nature of such "commercial" load or how much of such load is based on growth since the inception of this proceeding.

Coping with such a situation does not require the massive revision of El Paso's existing priority-of-service and curtailment provisions ordered by the Commission, particularly when its order is intended to apply for an interim period. Increased curtailment of the industrial customers east of California, which have alternate fuel capacity, does not constitute an "emergency". True, it may cost them more to burn oil instead of gas, but this does not justify a wholesale revamping of El Paso's service arrangements on an interim basis. This Court, in *Permian Basin Area Rate Cases,* 390 U.S. 747, 784, 88 S.Ct. 1344, 1381, 20 L.Ed.2d 312, 346 (1968), made it clear that while administrative authorities must be permitted to adapt their rules and policies to the demands of changing circumstances, they must do so *consistently with the obligations of due process.*

The Commission, by its Opinion Nos. 634 and 634-A, has unlawfully ordered El Paso to shift substantial volumes of gas away from its California customers for use as industrial fuel by its east-of-California customers. This shift of large volumes of gas to the east-of-California industrial market is clearly illustrated by the document entitled, "Scheduled Curtailment on El Paso's Southern Division System" [R. 13931-13933].

SoCal submits that while the Commission is justified in protecting residential and commercial "human-needs" users, the Commission was not justified in overriding the historical, contractual and tariff rights and relationships by reallocating gas supplies for the general benefit of east-of-California industrial loads; and the Commission has thereby deprived SoCal of its property without compensation.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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THOMAS D. CLARKE,
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May 24, 1974.

APPENDIX A.

Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-2204

AMERICAN SMELTING AND REFINING COMPANY, COMPANIA MINERA DE CANANEA, S.A. DE C.V., INSPIRATION CONSOLIDATED COPPER COMPANY AND KENNECOTT COPPER CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
Tucson Gas & Electric Company
Johns-Manville Products Corp.
General Motors Corp.
San Diego Gas and Electric Co.
El Paso Natural Gas Co.
Southern Union Gas Co.
Shell Oil Co.
Southwest Gas Corporation
Salt River Project Agricultural Improvement and Power District
Arizona Public Service Co., Intervenors

No. 73-1016

SAN DIEGO GAS AND ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
Johns-Manville Products Corp.
General Motors Corp.
Tucson Gas and Electric Co.
Shell Oil Company
Southern Union Gas Co.
Southwest Gas Corp.
Salt River Project Agricultural Improvement and Power District
El Paso Natural Gas Company
Arizona Public Service Co.
Southern California Edison Co.
People of the State of California and the Public Utilities Commission of the State of California
American Smelting and Refining Co., et al, Intervenors

No. 73-1040

PACIFIC GAS AND ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
General Motors Corporation
Johns-Manville Products Corp.
Tucson Gas and Electric Co.
Shell Oil Company
Southern Union Gas Co.
Southwest Gas Corp.

Salt River Project Agricultural Improvement and Power District
El Paso Natural Gas Co.
Arizona Public Service Co.
Southern California Edison Co.
People of the State of California and the Public Utilities Commission of the State of California
San Diego Gas and Electric Co.
American Smelting & Refining Co., et al, Intervenors

No. 73-1042

SOUTHERN CALIFORNIA GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
General Motors Corporation
Johns-Manville Products Corp.
Tucson Gas and Electric Co.
Southern Union Gas Co.
Southwest Gas Corp.
Salt River Project Agricultural Improvement and Power District
Shell Oil Co.
El Paso Natural Gas Co.
Arizona Public Service
Southern California Edison Co.
People of the State of California and the Public Utilities Commission of the State of California
San Diego Gas and Electric Co.
American Smelting and Refining Co., et al
Nevada Industrial Customers, Intervenors

No. 73-1050

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Tucson Gas and Electric Co.

Shell Oil Co.

Johns-Manville Products Corp.

General Motors Corp.

Salt River Project Agricultural Improvement and Power District

Arizona Public Service Co.

El Paso Natural Gas Co.

People of the State of California and the Public Utilities Commission of the State of California

Southern Union Gas Co.

San Diego Gas and Electric Co.

Department of Water and Power of the City of Los Angeles

American Smelting and Refining Co., et al

Southwest Gas Corp., Intervenors

No. 73-1102

AMERICAN SMELTING AND REFINING COMPANY, COMPANIA MINERA DE CANANEA, S.A. DE C.V., INSPIRATION CONSOLIDATED COPPER COMPANY AND KENNECOTT COPPER CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

El Paso Natural Gas Co.

Pacific Gas and Electric Co.

Shell Oil Company

General Motors Corp.

Johns-Manville Products Corp.

Southwest Gas Corp.

San Diego Gas and Electric Co.

Southern Union Gas Co.

No. 73-1116

CITY OF WILCOX AND ARIZONA ELECTRIC POWER COOPERATIVE, INC., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

American Smelting and Refining Co., et al

Johns-Manville Products Corp.

General Motors Corporation

El Paso Natural Gas Co.

San Diego Gas and Electric Co.

Southern Union Gas Co., Intervenors

No. 73-1148

SOUTHERN UNION GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
American Smelting and Refining Co., et al
El Paso Natural Gas Co.
Tucson Gas and Electric Co.
General Motors Corp.
Johns-Manville Products Corp.
San Diego Gas and Electric Co.
Southwest Gas Corp.
Pacific Gas and Electric Co., Intervenors

No. 73-1152

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
Shell Oil Company
El Paso Natural Gas Company
Tucson Gas and Electric Company
Southern Gas Corporation
General Motors Corporation
Johns-Manville Products Corp.
Air Pollution Control District of the County of Los Angeles
American Smelting and Refining Co., et al
Southern Union Gas Co.
San Diego Gas and Electric Co., Intervenors

Petitions for Review of Orders of the Federal Power Commission

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Decided January 21, 1974

K. R. Edsall for petitioner in No. 73-1042, also argued for petitioners in Nos. 73-1016, 73-1040, 73-1050 and 73-1152.

Robert J. Haggerty for petitioner in No. 73-1148 and intervenor Southern Union Gas Company.

Arnold D. Berkeley, with whom *George Spiegel* was on the brief for petitioner in No. 73-1116.

George W. McHenry, Jr., Acting Solicitor, Federal Power Commission with whom *Leo E. Forquer*, General Counsel and *Platt W. Davis, III*, Attorney, Federal Power Commission were on the brief for respondent. *Gordon Gooch*, General Counsel at the time the record was filed also entered an appearance for respondent in No. 73-1116.

Edward J. Grenier, Jr., with whom *Richard Noland* and *Richard J. Pierce, Jr.*, were on the brief for intervenors, General Motors Corporation and Johns-Manville Products Corporation.

Jerome Ackerman and *James R. McCotter* were on the brief for petitioners in Nos. 72-2204 and 73-1102 and intervenor, American Smelting and Refining Co. et al.

Sherman Chickering, C. Hayden Ames and *David R. Pigott* were on the brief for petitioner in No. 73-1016 and intervenor San Diego Gas and Electric Company. *Donald J. Richardson, Jr.*, also entered an appearance for intervenor San Diego Gas and Electric Company in Nos. 72-2204, 73-1040, 73-1042 and 73-1050.

Rollin E. Woodbury, Alan M. Nedry, Edward C. Farrell and *Arthur T. Devine* were on the brief for petitioner in No. 73-1050.

Frederick Searls entered an appearance for petitioner in No. 73-1040 and intervenor Pacific Gas and Electric Company in Nos. 73-1102 and 73-1148. *Daniel E. Gibson* also entered an appearance for intervenor Pacific Gas and Electric Company in No. 73-1102.

John P. Mathis, J. Calvin Simpson and *Lawrence Q. Garcia* were on the brief for intervenors, The People of the State of California and the Public Utilities Commission of the State of California in Nos. 73-1016, 73-1040, 73-1042 and 73-1050.

Thomas F. Brosnan and *Lawrence V. Robertson, Jr.*, were on the brief for intervenor Tucson Gas and Electric Company in Nos. 72-2204, 73-1016, 73-1040, 73-1042, 73-1050, 73-1148 and 73-1152.

C. Frank Reifsnyder was on the brief for intervenors, El Paso Natural Gas Company.

John William Whitsett and *Edward Farrell* were on the brief for intervenor Air Pollution Control District of the County of Los Angeles in No. 73-1152.

Thomas G. Johnson entered an appearance for intervenor, Shell Oil Company in Nos. 72-2204, 73-1016, 73-1040, 73-1042, 73-1050, 73-1102 and 73-1152. *Dan A. Bruce* also entered an appearance for intervenor Shell Oil Company in No. 73-1050.

Charles H. McCrea entered an appearance for intervenor Southwest Gas Corporation in Nos. 72-2204, 73-1016, 73-1040 and 73-1042. *Leonard L. Snaider* entered an appearance for intervenor Southwest Gas Corporation in Nos. 73-1050, 73-1102 and 73-1148

and intervenor Southern Gas Corporation in No. 73-1152.

Richard H. Silverman entered an appearance for intervenor Salt River Project Agricultural Improvement and Power District in Nos. 72-2204, 73-1016, 73-1040, 73-1042 and 73-1050.

Richard M. Merriman entered an appearance for intervenor Arizona Public Service Company in Nos. 72-2204, 73-1016, 73-1040. *Peyton C. Bowman, III,* also entered an appearance for intervenor Arizona Public Service Company in Nos. 72-2204, 73-1016, 73-1040 and 73-1116.

Henry F. Lippitt entered an appearance for intervenor Nevada Industrial Customers in No. 73-1042.

Before: FAHY, *Senior Circuit Judge,* TAMM and MAC KINNON, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* TAMM.

Concurring Opinion filed by *Senior Circuit Judge* FAHY at p. 49.

TAMM, *Circuit Judge:* We are called upon to review orders of the Federal Power Commission which establish a temporary curtailment plan for use on the Southern Division System of the El Paso Natural Gas Company. The temporary plan was approved on October 31, 1972 and will remain in effect until the Commission approves a permanent plan.[1] The purpose of a curtailment plan is to provide procedures for the allocation of gas among customers during periods of gas

[1]The interim plan was originally supposed to expire on October 31, 1973 unless a permanent plan was approved before then. On October 18, 1973, however, the Commission extended the operation of the interim plan pending further action on a permanent plan.

shortage. Much of the difficulty encountered in formulating such procedures for the El Paso system arises from the variety of customers it serves. The two California customers, Southern California Gas Company (SoCal) and Pacific Gas and Electric Company (PG &E) are partial requirements customers, i.e. El Paso is only one of the sources from which they obtain gas supplies. The customers situated in the southwestern states east of California, on the other hand, are full requirements customers. Many, if not all, of the service contracts between El Paso and its east-of-California (EOC) customers require El Paso to supply all gas requirements up to a stated daily maximum.[2] In the past, the EOC customers have borne the entire burden of service curtailments. Neither of the California customers had ever experienced any reduction of service from El Paso under former curtailment plans.[3] Not surprisingly, the alignment of the parties before us reflects this difference between the two categories of customers. The California customers object strongly to various aspects of the temporary plan. The EOC customers generally support the temporary plan although they, too, oppose certain features.

I. Background

On April 15, 1971, the Commission issued Order No. 431, a statement of general policy. Citing recently experienced natural gas shortages,[4] the order required

[2]J.A. at 735, 740, 746, 751, 757, 763, 769 and 776.

[3]J.A. at 343-44, 353 (Testimony of Mr. Travis Petty).

[4]Although the parties seem to agree that there is a serious shortage of natural gas, we make no assumption on this point. We pause, however, to note the following advertisement which appeared at page 23 of the Wall Street Journal on October 26, 1973: "Natural Gas—Long Term Supply Available—50 Billion Cubic Ft.—We can provide a 15 year supply at 10 million cubic ft. per day."

jurisdictional pipeline companies to take all steps necessary for protection of reliable and adequate gas service.[5] Any pipeline which expected that curtailment of service might be necessary was ordered to file tariff sheets setting forth a curtailment plan. Several months after order 431 was issued, El Paso filed proposed tariff revisions which modified the provisions in El Paso's FPC Gas Tariff governing curtailments in El Paso's Southern Division System. This matter is still pending before the Commission and no final order has been issued.

During the proceedings on the proposed revisions, however, El Paso filed a motion requesting the Commission to prescribe interim emergency curtailment procedures to be followed until the issuance of its final order. Although hearings regarding the proposed permanent plan had already been completed, they were reconvened for the limited purpose of ascertaining the need for interim curtailment procedures. Following ten days of hearings, the matter was submitted directly to the Commission, bypassing intermediate decision by the Administrative Law Judge. On October 31, 1972, the Commission issued Opinion No. 634, which (i) declared that the curtailment provisions of El Paso's tariff then in force were discriminatory and violative of the Natural Gas Act and (ii) established a temporary curtailment plan to be followed in El Paso's Southern Division until October 31, 1973 or the issuance of a final order in the proceedings, whichever should occur earlier.[6] This order and a later clarifying order are the subject of the present petitions for review.

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[5]The order is codified at 18 C.F.R. §2.70 (1973).

[6]The expiration date has been changed. See note 1, *supra.*

II. The Commission's Action

In Opinion No. 634 the Commission found that, in the event of a gas shortage, El Paso's existing tariff provisions called for complete cut-off of all EOC customers, including residential and small commercial customers, before any service to California would be curtailed.[7] Thus, even industrial users in California would have priority over EOC residential users. After concluding that these provisions were discriminatory and violative of sections 4 and 5 of the Natural Gas Act, the Commission further found that an interim curtailment plan should be adopted based upon the following schedule of priorities:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day) and residential needs associated with industrial requirements served directly or indirectly.

Priority 2. Large commercial requirements and industrial requirements for plant protection, feed-stock and process needs.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capacity is present.

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[7]According to the Commission's findings, the former tariff provisions required El Paso to curtail its customers in the following sequence (J.A. at 136):

(a) best efforts gas; (b) irrigation gas; (c) direct industrial gas; (d) industrial gas of distributors east of California (EOC); (e) commercial gas of distributors EOC; (f) residential gas for distributors EOC; (g) gas sales to California customers under Rate Schedule G.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day) boiler-fuel use where existing alternate fuel capability is present.[8]

Under the interim plan, delivery reduction in each subordinate category must be complete before deliveries for higher priority requirements are curtailed. The stated purpose of the plan is twofold: "(1) to protect deliveries for residential and small volume commercial consumers who cannot be safely curtailed on a daily basis and (2) to require, as the initial level of curtailment, reduction in deliveries for large volume boiler fuel applications where alternate fuels are available."[9] Following the issuance of Opinion 634, a number of parties requested stays, clarification, modification and rehearing. On December 15, 1972, the Commission issued Opinion 634-A, denying the requests for stay, modification and rehearing and clarifying the earlier opinion on several points.

Various parties have challenged the authority of the Commission to prescribe the interim curtailment plan, the adequacy of the fact findings upon which the plan is based and the appropriateness of the remedy it has adopted. Although we conclude that the Commission has the authority to implement interim curtailment plans pending final approval of permanent tariff provisions, we are compelled to remand this matter to the Commission because of certain defects in the orders now under review.

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[8]J.A. at 144.
[9]J.A. at 143-44.

III. The Commission's Authority

The authority of the Federal Power Commission to regulate service curtailments by natural gas pipelines has been sustained by the Supreme Court in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). The narrow question in that case was whether the FPC has jurisdiction to regulate curtailment of service to direct sales customers (as opposed to customers who purchase gas for resale). In deciding this issue in favor of the Commission, the Court provided broad guidance as to the scope of the Commission's authority. The Court found that the Commission's power to regulate curtailments is derived from two provisions of the Natural Gas Act: section 1(b), which makes the Act applicable to "the transportation of natural gas in interstate commerce," and section 16, which gives the Commission broad enforcement powers:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.

Id. at 638, 642. The Court also pointed out that the substantive standard for regulation of service curtailments is found in section 4(b) of the Act. *Id.* at 642. That section provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

The general authority of the Commission to regulate curtailment plans is not questioned by the petitioners and intervenors. It is argued, however, that the Commission has exceeded this authority in issuing Opinions 634 and 634-A. This contention is directed to substantive features of the opinions as well as the procedure whereby they were issued.

A. *Interim Orders*

As explained above, the orders under review are interim orders. An interim order is one entered during the course of proceedings which resolves some of the issues while leaving others to be determined at a later time. The use of interim orders is a well established practice in rate proceedings. *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 583-85 (1942); *FPC v. Tennessee Gas Co.*, 371 U.S. 145, 154 (1962). Although we are not aware of any case testing the use of this device in a curtailment proceeding, Supreme Court dicta indicates that it is perfectly proper. In *Louisiana Power & Light Co., supra,* the Court discussed the alternative Commission procedures available for regulation of curtailment plans. Noting the delay inherent in the section 5 procedure, the Court observed:

> Of course, even when conducting a § 5 hearing, the Commission would have emergency authority to issue interim orders effecting a curtailment plan.

406 U.S. at 644 n.18 (citation omitted). While this footnote mentions only the use of interim orders in section 5 proceedings, the technique has also been approved in proceedings under section 4, *FPC v. Tennessee Gas Co.*, 371 U.S. 145, 154 (1962). The fact that the instant proceedings were originally initiated under

section 4 has no bearing on the Commission's authority to promulgate the interim orders.

The briefs reveal some confusion as to the precise basis and extent of the Commission's authority to issue interim orders. It is suggested by some parties that the Commission was exercising "emergency authority"[10] and that the interim orders were only justified to the extent necessary to meet anticipated human needs shortages.[11] We think it is important, at the outset, to correct this misunderstanding of the Commission's authority.

The Commission's power to promulgate an interim curtailment plan is not born of emergency. Rather, it is based upon the statutory authorization to perform "any and all acts" necessary or appropriate for the implementation of the Natural Gas Act. As we have stated before, of course, section 16 does not itself grant independent powers but merely provides for implementation of the core sections of the Natural Gas Act. *Texaco, Inc. v. FPC*, 474 F.2d 416, 420 (D.C. Cir. 1972), *cert. granted*, 42 U.S.L.W. 3194 (U.S. Oct. 9, 1973). The "core section" underlying the orders now before us is section 5(a) which empowers the Commission, on its own motion, after hearing, to correct discriminatory practices by natural gas companies. Like any order issued pursuant to section 5(a), an interim order can only issue after full hearing and must include a statement of reasons based upon findings of fact which are supported by substantial evidence in the record. No emergency can excuse these procedural requirements.

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[10]San Diego Br. at 22; FPC Br. at 33.

[11]Edison Br. at 18; San Diego Br. at 20-23; SoCal Br. at 9; Willcox Br. at 44.

This is not to say that the exigencies of a gas supply shortage are completely irrelevant. The threat of a heating-season shortage such as that discussed in the briefs would be relevant to at least two determinations which the Commission must make: (1) whether an interim curtailment order is necessary and (2) whether a particular interim plan is just and reasonable. If, for example, there were no expectation that gas shortages would occur before a permanent plan could be formulated, then an interim order might be unnecessary, even though the existing curtailment regulations may be clearly discriminatory. Similarly, once it becomes necessary to adopt interim curtailment procedures, a plan which might not meet the "just and reasonable" standard if proffered as a final order might be acceptable as a temporary measure in light of the emergency. In short, the existence of an emergency is a factor to be considered by the Commission and by this court upon judicial review. It does not create special powers in the Commission, however, nor does it abrogate the usual procedural requirements for valid administrative action.

B. *Abrogation Of Contract Rights*

One of the most persistent objections to the Commission's curtailment plan is that it disrupts the contractual relations of the parties. The California customers point out that they have negotiated for and received firm commitments from El Paso, whereas the service to EOC customers is, by the terms of their contracts, subject to curtailment.[12] The new curtailment plan, however, requires all of El Paso's customers to share rat-

[12]This interpretation of the El Paso service contracts is not undisputed. *See* Brief of Intervenors American Smelting and Refining Co. *et al.* at 2-9.

ably the burden of any future gas shortage. According to the California customers, this deprives them of the protection from service interruptions for which they have contracted and provides a windfall to less diligent customers east of California. The short answer to this argument is that the Commission is not bound by agreements among parties subject to its jurisdiction. Section 5(a) of the Act gives the Commissioner authority to override discriminatory contractual arrangements:

> (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. . . .

In issuing Opinions 634 and 634-A, the Commission was clearly acting within this provision.[13] Having found that then existing curtailment procedures for El Paso's Southern Division were discriminatory, the Commission was authorized to promulgate substitute procedures. To the extent that the illegal curtailment plan was reflected in customer service contracts, such

[13]Opinion No. 634, ¶ 4, J.A. at 135.

contracts were also superseded by the Commission's orders.

Several of the parties concede the Commission's authority to override contractual arrangements, but argue that the opinions now under review lack certain threshold findings which, they say, are a condition precedent to the exercise of that authority. These parties rely chiefly upon the following passage from *International Paper Co. v. FPC*, 476 F.2d 121, 128 (5th Cir. 1973):

> It must be recognized that there are two quite difficult determinations that the FPC must take before it can abrogate terms in private contracts even accepting the most favorable reading that the claimed power can be given. First, we feel it is incumbent on the agency to give clear reasons why it has determined that these substitute fuel clauses are indeed "undue preferences" within the meaning of that term in the Natural Gas Act.
>
> . . . .
>
> Secondly, we feel that the FPC must make findings and set forth its reasons for holding that abrogation of these clauses is "in the public interest." The FPC must show that the recognized public interests in freedom to contract and contract stability are outweighed by the public interest it seeks to assert under the Natural Gas Act.

Taken out of context, this language appears pertinent. A full reading of the *International Paper* case discloses, however, that the issue in that case was quite different from that presented here. The question decided in *International Paper* was whether the Commission's adoption of a curtailment plan would *ipso facto*

immunize the pipe line from liability for breach of service contracts. In other words, would a pipe line be liable to its customers for non-delivery if acting in compliance with a valid Commission order which contains no express findings regarding contractual liability. The court concluded that such an order would not be an absolute defense absent express findings with respect to contractual liability. 476 F.2d at 125. Hence, the twin findings mentioned in the *International Paper* opinion are only required for the purpose of exonerating a pipe line from liability for breaches of contract which may result from compliance with Commission orders.[14] The petitions now before us do not concern the remedial rights of the pipe line and its customers *inter sese*, but the authority of the Commission to override a contractually arranged curtailment plan. On the latter question, the statute leaves no doubt. The only preliminary finding required by the statute is that the former plan was discriminatory, a finding clearly expressed in Opinion 634.[15]

C. *The End Use Method*

As explained above, the plan adopted in Opinion 634 establishes a schedule of priorities to be followed in allocating gas service curtailments. The differentiating factor among these priorities is "end use." Thus, the Commission has determined that certain uses of gas (e.g. use by residential and small commercial customers) should have a higher priority than others (e.g.

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[14]We express no opinion as to the correctness of the *International Paper* decision, which suggests that a pipeline whose own shortsightedness or overreaching necessitates a curtailment plan should not be immune from contractual liability. 476 F.2d at 126 n.5.

[15]J.A. at 136-37.

use as boiler fuel). In the event of a shortage, customers purchasing gas for inferior uses will be completely cut off before any service to higher-priority customers is curtailed. Several parties take issue with the Commission's treatment of boiler fuel uses in this scheme. Their objections are discussed below at part V, C. For the moment we wish to take up the contention of petitioner City of Willcox that the Commission "exceeded its statutory powers by prescribing service priorities based upon the nature of end use by ultimate consumers."[16] Unlike those who merely object to the Commission's treatment of boiler fuel uses, Willcox asserts that the entire scheme of end use priorities is illegal. We disagree.

Willcox' attack on the Commission's authority is two-fold. Its first contention is that end use is an improper criterion. The authorities relied upon by Willcox are inapposite, however. In *Fuels Research Council, Inc. v. FPC*, 374 F.2d 842 (7th Cir. 1967), the court approved a two-part rate structure which allocated costs among peak season customers and off-peak customers. A dissatisfied customer complained that the rate structure in question would encourage "inferior" uses of natural gas. The court replied that the Commission "is not authorized to consider the end use of natural gas in a *rate proceeding* [citation omitted] as distinguished from a certificate proceeding under section 7 of the Act." *Id.* at 854 (emphasis added). The decision does not prohibit consideration of end use in a curtailment proceeding.

Public Service Commission of the State of New York v. FPC, 463 F.2d 824 (D.C. Cir. 1972), also cited by

[16]Br. at 48 *et seq.*

Willcox, involved the Commission's certification of a proposed sale of natural gas for use in an oil refinery. The New York Public Service Commission sought review, arguing that the contemplated use was inferior to use by interstate residential and commercial customers. We remanded the case to the Commission for consideration of that objection.[17] The Commission sustained itself and the New York Commission again sought review. We affirmed the Commission, concluding: ". . . it cannot be said that 'a balance of *all* the circumstances' weighs against granting the certificate here." *Id.* at 829-30. It is important to note, however, that we did not disapprove consideration of end use in certification poceedings:

> In different certificate applications the factor of end use will have varying importance. In the case at bar the end use factor is not, by itself, of decisive importance. While it may be true that as to the particular natural gas involved, it would be desirable to have this gas go into the hands of residential rather than industrial users, there is no assurance that this would happen if the certificate were not granted.

Id. at 826.

Willcox' second objection to the end use method is that the plan effects a "reallocation" of gas supplies in violation of section 7(a). Willcox relies upon *FPC v. Transcontinental Gas Corp.*, 365 U.S. 1 (1961). In that case the Supreme Court was called upon to review the Commission's refusal to approve a contract for the

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[17]Public Service Commission of the State of New York v. FPC, 436 F.2d 904 (D.C. Cir. 1970).

sale of natural gas to be used as boiler fuel. The Commission denied certification on grounds, *inter alia,* that the proposed use of the gas was inferior to residential needs. The Court *approved* the Commission's action, stating that end use was a proper consideration in disapproving the contemplated sale. 365 U.S. at 22. Although this holding endorses the Commission's consideration of end use, the Willcox brief directs our attention to the following admonition of the Court:

> [I]t must be realized that the Commission's powers under § 7 are, by definition, limited. [Citation omitted.] The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification.

Id. at 17. We reiterated that admonition in *Granite City Steel Co. v. FPC,* 320 F.2d 711 (D.C. Cir. 1963), also cited in the Willcox brief, when we disapproved the Commission's wholesale reallocation of pipe line capacity from industrial users to public utility customers. Neither that ruling nor the dictum of the Supreme Court quoted above is in point, however. Both opinions were concerned with section 7(a) which prohibits the Commission from compelling a natural gas company to sell natural gas when to do so would impair service to existing customers. As we stated in *Granite City:*

> The theory and purpose of the statutory restriction appear to be that persons desiring gas *for the*

> *first time*, or desiring *more* gas, should not get it by taking it away from existing lawful customers.

320 F.2d at 713 (emphasis added). Quite clearly, this statutory restriction is not infringed by a curtailment plan based on end use. The curtailment plan does not order the sale of additional gas to one customer to the detriment of another. Rather, it prescribes a formula for allocating insufficient supplies among existing customers. We are not unmindful of Willcox' argument that *the effect* of the interim plan under review is the same as an order reallocating gas supplies from one customer to another, since the former curtailment plan would have protected the California customers from service curtailments. Even if this is true, however, we do not think the statutory prohibition applies to curtailment plans. Section 7(a) is plainly intended to regulate *expansions* of service. The prohibitory proviso we have been discussing must be read in that context. If this clause is construed to forbid approval of any curtailment plan which effects a shifting of the burden of future gas shortages, then the Commission would be powerless to regulate curtailments. Such a result would obviously be at odds with the Supreme Court's holding in *Louisiana Power & Light, supra.*

We conclude, therefore, that the curtailment plan now under review does not violate the section 7(a) prohibition against reallocation of gas service and is not inconsistent with previous decisions regarding the propriety of end use criteria in the regulation of the natural gas industry. Indeed, we think end use is a most appropriate consideration for purposes of a curtailment plan.

IV. The Commission's Findings of Fact

Several of the parties maintain that certain of the Commission's fact findings are not adequately supported by the evidence. The standard of our review in such matters is defined by the Natural Gas Act, section 19(b):

> The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

A. *Findings Regarding The Former Plan*

In Opinion No. 634 the Commission found that, under tariff provisions then in effect, El Paso's California customers would be protected from service curtailments until all service to EOC customers had been completely cut off. As a result, the Commission found, human needs customers (residential and small commercial customers) in one part of the El Paso system would be subordinate to industrial customers in another part in the event of a severe gas shortage. That the Commission's concern was more than merely theoretical is apparent from the following statement:

> The supply evidence introduced by El Paso at the reopened proceeding clearly indicated that there was a real probability that curtailments under its presently effective tariff would result in cutting off not only commercial customers east of California but residential customers also, while California would probably be curtailed not at all.

J.A. at 137. Based upon these findings, the Commission concluded that the curtailment provisions of El Paso's tariff were discriminatory under sections 4 and 5 of the Natural Gas Act.

We think the Commission's findings as to the effect of El Paso's former curtailment plan are, for the most part, sustained by substantial evidence in the record. Exhibit 237[18] before the Commission indicates that, under the former plan, EOC customers would have borne the entire burden of estimated curtailments for the twelve-month period commencing on November 1, 1972, while service to California remained undisturbed. On a peak day, deliveries to EOC distributors for resale to residential and commercial customers would have been curtailed by about 25%, according to the estimate, and EOC direct industrial customers would have been completely shut off.[19] In addition, there would have been some amount of EOC curtailment on virtually every other day of the year.[20] This evidence was summarized by one of El Paso's witnesses at the hearings:

> Q. And what conclusion do you draw from, or would you have us draw from, the showings made in [Exhibit 237, Sechedule 1]?
>
> A. I can tell you what conclusions I draw from the information shown there, and that is significant curtailment of the customers east of California, of the commercial and residential component of the requirements on a peak day, and full service to California, and significant industrial and irrigation curtailments to the east of California

[18]"Summary of Estimated Monthly Mainline Requirements, Curtailment and Sales for the Period November 1, 1972 through October 31, 1973 Based on El Paso's Currently Effective Tariff," Prepared by El Paso Natural Gas Co., J.A. at 651 *et seq.*

[19]J.A. at 477 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.).

[20]Exhibit 237, Schedule 1, pp. 14-17, J.A. at 665-68; J.A. at 477 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.).

> customers on the average days throughout the year, while full service is being rendered to the California customers by El Paso.

J.A. at 542. Several petitioners challenge these estimates, stating that supplies have been underestimated and peak day demands exaggerated. The maximum demand estimate is, in fact, based upon a hypothetical coincidence of peak demand days throughout the El Paso system.[21] Such an eventuality is so improbable, it is argued, that there is no substantial evidence to support the Commission's forecast of commercial and residential curtailments east of California. We think that the evidence supports the Commission. There was credible testimony that the weather conditions required for a systemwide coincidence of peak demand had in fact occurred in the past and were likely to occur again.[22] Moreover, the forecasting of demand for natural gas is a matter within the peculiar expertise of the Commission and cannot lightly be upset by a reviewing court.

The estimated supply figures presented by El Paso are questioned because they fail to include two sources of gas. The first of these is withdrawal of gas from certain wells in excess of amounts allowed by various state regulatory authorities. There was reliable testimony, however, to the effect that "exceeding allowables" is a short-term emergency measure involving potential adverse effects upon supplies in the future.[23] The Commission was not required to insist that this re-

[21] J.A. at 475.

[22] J.A. at 477, 540-41, 546, 554 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.).

[23] J.A. at 568-69, 572 (Testimony of A. M. Derrick of El Paso Natural Gas Co.).

source be exhausted before it could conclude that EOC commercial and residential customers were in danger of curtailment. The second source of gas not included in the supply estimate is gas which would be made available through curtailment of "field sales." Even taking into account curtailments of field sales, however, it is clear that severe curtailment of EOC customers would have persisted. The proposed curtailment of field sales could only provide an additional 69,000 Mcf of gas to offset peak day curtailments of EOC residential-commercial service which were expected to reach 226,000 Mcf.[24]

In short, we think the Commission's prediction of severe EOC curtailments under the former plan is supported by substantial evidence. We note, however, that the testimony does not distinguish between commercial and residential service for purposes of estimating peak day demands. Exhibit 237 merely contains figures representing aggregate peak day curtailment of both commercial and residential EOC customers which could have been anticipated under the former plan.[25] There is no indication that residential customers would actually have been curtailed at all.[26] It is possible that the estimated 25% cutback of residential-commercial service would have been completely absorbed by the commercial sector. Consequently, there is no substantial evidence to sustain the finding that EOC residents

[24]Exhibit 237, Schedule 1, pp. 1-14, 18, J.A. 651-65, 669.

[25]Testimony indicates that separate estimates of residential and commercial needs on a peak day were not available to El Paso. J.A. at 545 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.).

[26]El Paso's witness conceded that he could not predict residential curtailment on an *average* day, as opposed to a peak day. J.A. at 545.

would "probably" or "undoubtedly" have been curtailed under the old plan. On the other hand, the evidence does sustain the conclusion that peak day curtailment would, at minimum, cause the complete shutdown of EOC direct industrials and substantial reduction of service to EOC commercial customers while California service remained undisturbed. We think the latter findings form a sufficient basis for the Commission's actions to the extent we affirm them in this opinion. We recognize, of course, that the Commission might have followed a different course of action had it not incorrectly concluded that EOC residential customers would "undoubtedly" be curtailed under El Paso's previous tariff provisions. Upon remand, the Commission is free to modify its orders accordingly, subject to further review by this court.

B. *Findings Regarding "Grouping"*

"Grouping", or "conjunctive billing" as it is sometimes called,[27] is a practice whereby a customer having more than one delivery point on a pipeline is permitted to take delivery of its gas entitlements at whichever delivery points and in whatever proportions it chooses. Because this practice was not mentioned in Opinion 634, El Paso requested clarification of the Commission's position with respect to grouping. The Commission responded in Opinion 634-A as follows:

> [W]e find that the imposition of conjunctive billing as proposed by El Paso is not justified at this time, and could well result in increased industrial

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[27]We note that these terms are not necessarily synonymous. *See* Decision of Administrative Law Judge on Grouping of Delivery Points, p. 1 (September 19, 1973). (This decision approves grouping for purposes of the permanent plan.)

> gas usage by those customers having a number of delivery points. Certainly it could result in discrimination against those customers, including California, who have only one delivery point.

J.A. 241. Southern Union Gas Co. ("Union") objects to this prohibition against grouping. Union is a gas distribution company with many relatively small distribution systems scattered along El Paso's Southern Division System. Each of Union's systems connects with the El Paso line but they are not otherwise interconnected. Prior to the Commission's prohibition against grouping, service curtailments to Union were computed on a systemwide basis. Thus, if a 30% curtailment of priority 5 gas were in effect on a given day, Union would be curtailed by a volume equal to 30% of the total of its priority 5 entitlements. The effect of Opinion 634-A is that curtailments to Union must now be computed separately for each delivery point. Mathematically, the result would appear to be the same, but as the testimony of Union's Vice-President points out, there is a significant difference:

> A. The best way to explain it probably would be to take the case of a delivery point from El Paso to Southern Union through which only one industrial customer is served. We have, in fact, several such situations. Let's assume this is a Priority 4 customer with a daily requirement of 1,000 Mcf, and that during a particular 10-day period El Paso is curtailing its Priority 4 deliveries an average of 30 percent each day. In that situations, as El Paso is interpreting Opinion No. 634-A, Southern Union cannot receive for redelivery to this customer more than 700 Mcf on any one day.

> And right there is where we run into trouble, because many of our industrial customers cannot, as a practical matter, continue operating their facilities if their gas supply is subject to any significant curtailment. So far as gas usage is concerned, they are either completely on or completely off.

J.A. 582-83 (Testimony of Oran L. Haseltine). The grouping method would permit Union to deliver gas to its on-or-off customers in such a way that none would be curtailed more than necessary and systemwide curtailment of Union would be on a level equal with other El Paso customers. Thus, if a 30% curtailment of priority 4 customers were in effect for a ten-day period:

> [W]e could provide the customer with his full requirements on seven days and cut him off completely for three. This, over the full 10-day period, would give him merely the same 7,000 Mcf in the aggregate which we have assumed to be his entitlement. Instead of effectively shutting him down for the entire 10 day period simply because he cannot operate on only 700 Mcf per day, we would have enabled him to continue operating 70 percent of the time.
>
> . . . .
>
> By staggering the days to cut-off among them, we obviously should be able to put all of them on the same sort of three-days-off, seven-days-on schedule I've been talking about, and still overall not be delivering more gas to them on any day than the aggregate of its individual allotments of gas for that purpose; none of El Paso's other customers would suffer any resultant decrease in service.

Id. at 586-87. We are not called upon here to judge the merits of the grouping technique. The testimony set out above is cited only for the purpose of explanation. The question before us now is whether the Commission acted arbitrarily in prohibiting this practice. Union argues that there is no evidence of record to support the Commission's finding that grouping of delivery points "could result in discrimination against those customers, including California, who have only one delivery point." The Commission's brief fails to point out any such evidence and, at oral argument, counsel conceded that there was none:

> QUESTION: Well, couldn't we find that there was no substantial evidence supporting the grouping decision and just excise that out of the order?
>
> MR. McHENRY: Your Honor, there is no substantial evidence supporting the position taken by Southern Union on this record that it should necessarily have grouping. This was just—
>
> QUESTION: Is there any evidence to the contrary?
>
> MR. McHENRY: I don't believe there is evidence to the contrary, either way or the other, on this record, your Honor.

Tr. at 44. The Commission suggests that its action was justified because Union failed to raise the issue at hearings on the interim plan. It is clear, however, that the burden is upon the Commission to show that substantial evidence sustains its finding that grouping of delivery points would be discriminatory. There is no indication that the question was ever considered until El Paso requested clarification of the Commission's original order, Opinion No. 634. Indeed, testimony before

the Commission strongly suggests that it was understood by all parties that grouping would be permitted. We conclude, therefore, that the Commission's findings with respect to grouping are not supported by substantial evidence. The Commission's Opinion No. 634-A must be reversed to the extent that it prohibits grouping of delivery points by El Paso's customers, and remanded for further fact findings.

V. The Commission's Conclusions of Law

At this point it may be helpful, for purposes of our analysis, to restate the source of the Commission's authority to prescribe an interim curtailment plan:

> Whenever the Commission . . . shall find that any rate, charge or classification . . . or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. . . .

Natural Gas Act, section 5(a). The Commission's exercise of its authority under this statute is a two-step adjudicatory process: first, the Commission must find that an existing condition is unjust or discriminatory; second, the Commission must prescribe the remedy for that condition. Each step requires the Commission to draw a legal conclusion, *viz.*: the illegality of an existing condition and the justness and reasonableness of

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[28]J.A. at 550 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.), 576 (Testimony of James M. Kiely, Jr. of the FPC staff).

the remedy. In the present case, the Commission has found that El Paso's former curtailment procedures are "discriminatory under sections 4 and 5 of the Natural Gas Act" and that the temporary curtailment plan promulgated in Opinion 634 is "reasonable, necessary, appropriate and in the public interest." Our reviewing function with respect to such conclusions of law is somewhat different from that applied to the Commission's findings of fact. This difference was pointed out in the concurring opinion of Chief Judge Stephens in *Capital Transit Co. v. Public Utilities Commission*, 213 F.2d 176, 187 (D.C. Cir.), *cert denied*, 348 U.S. 816 (1954):

> The decisions require a commission in a quasi-judicial proceeding to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings—this in order that the commission shall itself perform the initial function of evaluating the evidence and deciding the issues of fact, and in order that the courts, as reviewing tribunals, can decide whether or not the ultimate decision reached by the commission follows as a matter of law from the facts found as its basis, and also whether or not the facts found have substantial support in the evidence.

See also Saginaw Broadcasting Co. v. FCC, 96 F.2d 554, 559 (D.C. Cir.), *cert. denied*, 305 U.S. 613 (1938); *In re United Corp.*, 249 F.2d 168, 179-80 (3rd Cir. 1957); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The Commission's action must be sustained if it is reasonable in light of the

basic fact-findings and the record evidence. In the matter now before us, a number of the parties challenge the reasonableness of the Commission's action. This part of the opinion will consider those objections.

A. *"Pre-existing Curtailment"*

Petitioners Southern California Edison Co. and the Department of Water and Power of the City of Los Angeles (hereafter referred to collectively as "Edison") argue that the Commission's action is unreasonable in light of the gas supply shortages being experienced in the California market.[29] The Southern California Gas Company (SoCal) and the San Diego Gas and Electric Company (San Diego) also complain that the Commission has ignored the shortages in California. The position of SoCal and San Diego is that the Commission should have taken the alleged California shortages into account in formulating the interim plan. Edison, on the other hand, argues that, had the Commission considered these shortages, the former plan would not have been found to be discriminatory.

Edison's argument must fail. The Commission properly found, based upon substantial record evidence, that the former curtailment plan would have required complete cutoff of EOC customers prior to any curtailment by El Paso of its service to California customers.[30] Based upon this finding it was reasonable for the Commission to conclude that the former tariff provi-

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[29]For purposes of clarity, we do not follow Edison's practice of referring to these shortages as "pre-existing curtailment." In fact, there had never been any curtailment of El Paso's service to its California customers prior to adoption of the interim plan. J.A. at 340, 344, 353 (Testimony of Mr. Travis Petty of El Paso Natural Gas Co.).

[30]See the discussion at part IV A, *supra*.

sions governing curtailment were discriminatory, regardless of the shortages which plague California.

SoCal and San Diego raise a more difficult question, namely: was it reasonable for the Commission to issue an interim curtailment plan which fails to take into account pre-existing gas shortages in California? In our opinion the answer is yes. Admittedly, the Commission's opinions are devoid of any mention of recent supply shortages in California, although the record contains testimony on the matter.[31] The opinions call for ratable curtailment of all customers without any adjustments which might lighten the burden of curtailment for customers already experiencing shortages. These facts strongly suggest that the Commission ignored the California supply problem when it formulated the interim plan. If the Commission had promulgated a *permanent* curtailment plan under these circumstances, failure to consider the pre-existing shortages in California and to enunciate findings with respect to that situation would almost certainly have been fatal. The orders under review are *interim* orders, however. On review, the court must take into account the temporary nature of the Commission's action as well as the exigencies which prompted the Commission to grant interim relief. An interim order is not arbitrary simply because it fails to resolve all issues raised in the proceeding.

In the present case, we think the Commission's action was reasonable. Once having determined that the existing curtailment procedures were discriminatory, the Commission was faced with the choice of allowing them to remain in effect pending issuance of a perma-

[31] J.A. at 529-31 (Testimony of John C. Abram of Southern California Gas Co.).

nent order, or instituting a temporary plan which would cure at least the more severe defects of the illegal plan. The main purpose of the interim plan was to avert the danger that EOC residential users might be curtailed during the winter of 1972-73. The pre-existing shortages in California add complex problems, the resolution of which the Commission properly deferred until the issuance of a final order.

Our approval of the Commission's action is obviously based upon the assumption that it has merely deferred consideration of California market conditions and that this factor will be taken into account in the formulation of the permanent plan. Ideally, such an intention should be expressed in the agency's interim order, so that the reviewing court is not left to guess at its reasoning. Upon remand, therefore, we invite the Commission to incorporate into its interim order a full statement of its reasons for postponing the resolution of issues arising from the California gas shortage.

B. *Withdrawals From Storage*

In computing the curtailment to be apportioned to each of its customers on a particular day, El Paso is required to use a formula set forth in section 11.3(b)(i) of its revised tariff, which we paraphrase as follows:

$$\frac{\text{Customer's Needs}}{\text{Systemwide Needs}} = \text{Customer's Share of Available Supply}$$

J.A. at 347 (Testimony of M. A. Erlich). Because California customers rely on El Paso for only part of their gas supply, only part of their needs are counted for purposes of this formula. The proper proportion is determined by the ratio of scheduled deliveries from El Paso to total scheduled deliveries from all sources. If,

for example, only one-half of the California customer's supply for the day is scheduled to be provided by El Paso, then only one-half that customer's requirements are counted for purposes of computing its share of the shortened El Paso supply. The basic formula set out above quickly discloses the effect of such a reduction of the "needs" figure: it reduces the customer's share of the El Paso supply.

The California customers do not challenge the basic fairness of this scheme, but they strongly object to the treatment of stored gas as an independent source of supply, because at least some of the gas withdrawn from storage on a particular day will be traceable to previous purchases from El Paso. Treating this gas as an independent supply, it is argued, results in an underestimation of El Paso's share of the total California market. This in turn causes excessive curtailment of California customers by El Paso. Apparently recognizing this problem, the Commission staff recommended an adjustment to the curtailment formula.[32] The Commission declined to include the adjustment in the interim plan, however, stating that it would add an "additional complication."[33] We do not think this brief and conclusory statement is sufficient to sustain the Commission's rejection of the staff proposal. As we stated in our discussion of "pre-existing curtailment," *supra*, problems which greatly complicate the Commission's work may properly be deferred if prompt interim action is necessary. In this instance, however, the staff had apparently been able to devise a solution for use under the interim plan. There is no suggestion that

[32]J.A. at 483 (Testimony of James M. Kiely, Jr. of the FPC staff).

[33]Opinion 634, ¶ 12, J.A. at 141.

the proposed storage adjustment formula would impede implementation of the interim plan. The mere fact that the solution is complicated cannot justify the Commission in refusing to provide just and reasonable interim curtailment procedures. We therefore remand this matter to the Commission for further consideration of the proposed storage adjustment formula.

One further question was raised in the briefs concerning the Commission's treatment of withdrawals from storage. SoCal takes the position that no part of such withdrawals should be counted as a source of supply for purposes of curtailment. To do otherwise, it is argued, will discourage the development of gas storage facilities. This prediction is convincingly disputed by testimony in the record.[34] Even if SoCal is correct, however, an otherwise just and reasonable determination of the storage issue is not invalid merely because it might be a disincentive to the storage of gas. The development of storage facilities is an ancillary policy consideration committed to the discretion of the Commission. The failure of a particular proposal to conform in all respects to established policies of natural gas regulation does not necessarily preclude Commission approval of the proposal.[35]

C. *Shift of Industrial Gas*

Perhaps the most strenuous objections of the California customers to the temporary plan are directed

[34]J.A. at 346-49 (Testimony of M. A. Erlich of El Paso Natural Gas Co.).

[35]For similar reasons, we do not think arguments addressed to the economic impact of the interim plan (SoCal Br. at 20; PG&E Br. at 17; San Diego Br. at 31), its effect on the development of alternate fuel facilities (PG&E Br. at 21) and the

(This footnote is continued on next page)

toward its effect on the allocation of gas for industrial uses. As explained above, the old curtailment plan placed every EOC customer in a priority subordinate to all California customers. In the event of a gas shortage, the California customers would have been the last to suffer any curtailment. Since the temporary plan is based upon categories of end use, however, the California customers must now share ratably any curtailment which becomes necessary. As a result, EOC industrial users will suffer less immediate curtailment than under the old plan and the California industrial users will suffer more. This effect is referred to by the California customers as a "shift" of industrial gas from California to EOC users. They complain that this measure is not warranted by the "emergency" and not necessary for the protection of EOC human needs customers.[36] This contention plainly misapprehends the basis and scope of the Commission's action.

In Opinion 634 the Commission clearly found that the former curtailment plan was discriminatory *in toto*, not just in its effect upon EOC human needs customers:

> Under [the former] tariff provision no curtailment would take place to California customers until all EOC service had been curtailed. This means that both residential and commercial customers east of California would be cut off before any service to California was cut off. Almost all of the parties concede that under the present cir-

availability of "less disruptive" plans (SoCal Br. at 24) require reversal of the Commission's interim order. Of course any of these factors may take on greater significance for purposes of a permanent curtailment plan.

[36]Tr. at 24; SoCal Br. at 13; PG&E Br. at 13 *et seq.*; Edison Br. at 20-22; San Diego Br. at 7-8, 20-23.

> cumstances this would patently discriminate against the EOC customers. The supply evidence introduced by El Paso at the reopened proceeding clearly indicated that there was a real probability that curtailments under its presently effective tariff would result in cutting off not only commercial customers east of California but residential customers also, while California probably would be curtailed not at all. It is obvious that we would be negligent in our duties if we allowed human needs customers on any portion of the system to be cut off while industrial customers were still receiving gas on another portion of the system. We find that the currently effective plan of El Paso, is discriminatory and violative of Section 4(b) of the Natural Gas Act.

J.A. at 136-37. Concededly, the Commission placed great emphasis upon the most eggregious faults of the former plan, i.e. its effect upon EOC residential and small commercial customers. But the key findings of the Commission refer to EOC customers generally: the former curtailment plan "would patently discriminate against the EOC customers" because ". . . no curtailment would take place to California customers until all EOC service had been curtailed." Since we have already concluded that these findings are sustained by substantial evidence (part IV A), the only remaining question is whether the temporary plan is arbitrary in its treatment of industrial users in California. We think not. The ratable curtailment of industrial users in order to protect supplies to Priority 1 and Priority 2 customers is a reasonable interim course of action in light of the Commission's findings. Although it might not be the sole solution or the best solution, it is certainly within

the range of conclusions which might be reached by reasoned decision making. A separate question arises regarding the Commission's disparate treatment of boiler fuel users as opposed to other industrial customers. This is treated in the following section.

D. *Boiler Fuel Uses*

Under the Commission's interim curtailment plan, the lowest two priorities (Priority 4 and Priority 5) are assigned to customers who use natural gas as boiler fuel when alternate fuel facilities are present. (The only difference between Priority 4 and Priority 5 is the daily volume involved.) Such customers will be the first to experience curtailment in the event of a gas shortage and service to them will be completely terminated before any curtailment of service to higher priority customers, including industrial customers applying gas to uses other than as fuel for boilers. Several of the parties argue that this treatment of boiler fuel uses is unreasonable[37] and not supported by substantial evidence.[38] It is also contended that the Commission failed to articulate its reasons for assigning the lowest priority to boiler fuel uses.[39] We think the last contention is dispositive.

A search of the two opinions under review reveals no specific findings or reasoning in support of the Commission's decision to assign boiler fuel uses of gas to the lowest priority. As we have stated many times in the past, the failure of an administrative agency to articulate the reasons for a particular decision makes

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[37]PG&E Br. at 20-22; Brief of Intervenor State of California at 7-8.

[38]Edison Br. at 33-35; Willcox Br. at 5-6.

[39]PG&E Reply Brief at 10; Willcox Br. at 55.

meaningful review of that decision impossible. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Upon remand of this proceeding, the Commission is directed to make findings concerning the curtailment priority appropriate for boiler uses and to state the reasons for its determination.

The Government suggests that it was not necessary for the Commission to state its reasoning in this matter because the determination is supported by established Commission policy and precedent. We requested supplemental briefing on this point by our Order of October 31, 1973, which posed the following question:

> Is there established Commission policy and precedent which will sustain the Commission's further finding (2) of Opinion No. 634 subordinating certain boiler fuel uses to all other uses?

We conclude that this question must be answered in the negative.

While it is true that the Commission has for a long time considered the use of natural gas as boiler fuel to be "inferior" to other uses,[40] it is clear from the decisions of the Commission that this policy has never been conclusive. Rather it is but one factor to be considered in making a regulatory decision affecting boiler fuel use. The Commission itself recently recited a litany of cases in which the use of natural gas as boiler fuel had been approved:

> Commission policy in the past has not been to deny boiler fuel sales, but to authorize them where they served some public advantage. *Texas Gas*

[40] *See, e.g.*, Federal Power Commission Annual Report (1940) at p. 79.

Transmission Corp., 12 FPC 658 (1953); *Transcontinental Gas Pipe Line Corp.*, 11 FPC 615 (1952); *Northern Natural Gas Company* (Black Dog), 29 FPC 1025 (1963); *Michigan Wisconsin Pipe Line Company*, 32 FPC 737 (1964). In the *Transcontinental* case the Commission authorized the sale of interruptible gas to Duke Power Company for boiler fuel where it was shown that Transco would obtain additional revenues without substantial operating cost. In the *Northern Natural* case the Commission approved a sale of natural gas for resale for boiler fuel where the sale was contemplated in a settlement of Northern's rates and was therefore beneficial to Northern's customers. In the *Michigan Wisconsin* case the Commission authorized the direct sale of gas to a power company for boiler fuel use where there would be a fuel saving to the power company and a resulting rate reduction by Michigan Wisconsin.

. . . .

In our opinion, while we have termed boiler fuel use inferior in the past, at present it cannot necessarily be so termed because of the air pollution problem. In *Transcontinental Gas Pipe Line Corp.*, 38 FPC 906 (1967), the Commission approved delivery of additional firm gas to Con Ed for boiler fuel use noting among other things that is [*sic*] would be an affirmative step in dealing with the air pollution problem.

Chandeleur Pipe Line Co., 44 FPC 1747, 1756 (1970). A subsequent opinion in the same case stated that "there is no superior or inferior use of natural gas *per se;* it depends upon the circumstances." *Chandeleur*

Pipe Line Co., 45 FPC 370, 371 (1971). Thus, the Commission's policy disfavoring the use of natural gas as boiler fuel can be outweighed by other considerations arising in a particular case. Our duty in this case is not to weigh the anti-boiler fuel policy against other factors, but to point out that such a balancing process must take place. The Commission's own recent statement of policy regarding curtailment priorities acknowledges as much:

> When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented.

FPC Order No. 467 at 1 (January 8, 1973).[41] The opinions now under review give no indication whether such an opportunity was provided or such a weighing of interests was conducted. In asking us to sustain its decision, the Commission is really asking us to hold that boiler fuel uses of natural gas are *per se* inferior to all other uses, for purposes of curtailment, regardless of the particular circumstances. As we said in *Public Service Commission of the State of New York v. FPC*, 463 F.2d 824, 826 (D.C. Cir. 1972), we are not prepared to so hold, and will not do so in the absence of a proper and definitive determination by the Commission that such is the case.

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[41]This order was modified by orders 467-A (January 15, 1973) and 467-B (March 2, 1973). The latter order contains the following statement: ". . . Order No. 467 is a policy statement and is not intended to initiate a proceeding or to provide a binding rule without further proceedings directed towards curtailment problems on specific pipelines."

E. *Volumetric Limits*

Following the issuance of Opinion 634, El Paso filed tariff revisions intended to implement the Commission's order. Section 11(j) of the revised tariff, which was approved by Opinion 634-A, establishes limits upon the amounts of gas El Paso's customers will be entitled to purchase while the interim order is in effect. There is both a daily limitation and a periodic limitation, i.e. a limit on the total amount of gas which may be purchased while the interim plan is in effect. For convenience, we shall refer to this latter limit as the annual limit. The daily limit is set at the maximum daily delivery obligation of El Paso under its contract with each customer. The annual limit is computed in either of two ways: (1) the limit for a customer who purchases his entire gas supply from El Paso (a "full requirements" customer) is the quantity actually received by that customer between July 1, 1971 and June 30, 1972 (plus any curtailment experienced during that period); (2) the limit for a customer who purchases only part of his gas supply from El Paso (a "partial requirements" customer) is a quantity equal to his maximum daily contract entitlement multiplied by the number of days in the year. Since the EOC customers are full requirements customers, the annual limit on their gas entitlements is measured under the first rule. The maximum annual entitlements of the two California customers (PG&E and SoCal) are measured under the second rule, however, because they are partial requirements customers.

Petitioner American Smelting and Refining Co. (Asarco) contends that the effect of this dual standard is that the California customers will be permitted to purchase volumes of gas in excess of the amounts delivered

to them in the past whereas Asarco and other EOC customers are limited to their historic takes.[42] In Asarco's view, such divergent treatment of these two classes of customers is discriminatory. The Commission, which devotes only a single footnote in its brief to the question, states simply that "[t]his treatment was reasonable and certainly within the Commission's discretion."[43]

We are unable to decide whether the Commission's action was reasonable or discriminatory because the Commission has not stated its reasons for adopting this dual annual limitation formula. The Commission's original order (Opinion 634) did not discuss or prescribe annual limitations. Opinion 634-A, which approved the El Paso tariff revision incorporating the formula, does no more than state that the annual limitations are consistent with those proposed by the Commission staff at the hearing.[44] In a subsequent order clarifying Opinion 634-A, the Commission shed little additional light upon a reason for its decision:

> East of California (EOC) customers are limited to annual takes during the twelve-month period ending June 30, 1972. This was provided for inasmuch as the existing contracts for EOC customers do not provide for annual limitations.

Order of February 7, 1973, J.A. at 334. While this does explain the need for a tariff provision restricting

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[42]Although this result is not readily apparent, recent modifications of SoCal's contract with El Paso together with past transfers of gas between PG&E and SoCal make it possible. Asarco Br. at 41-43. The Commission apparently admits this in its brief at 52 n.54.

[43]*Id.*

[44]J.A. at 242.

annual consumption by EOC customers, it does not explain why these customers should be restricted on a different basis than the California customers. We must therefore remand this matter in order to provide the Commission with an opportunity to make further findings and to state the reasons for its decision or any modification of that decision which may appear to be necessary.

F. *Penalties*

Asarco also objects to the Commission's deletion of overrun penalties from the revised tariff filed by El Paso in response to Opinion 634.[45] These penalties are apparently intended to discourage El Paso's customers from taking amounts of gas in excess of their maximum daily allotment under the interim plan. In Opinion 634-A, the Commission removed the penalty provisions, stating:

> With regard to penalties for unauthorized overruns, we note that El Paso has never had them in its tariff and we do not consider it appropriate to institute them in an interim proceeding. As we also noted above, a number of customers have not recently revised their contracts and have been making substantial overruns for the use of human needs customers. While some provisions for preventing unauthorized overruns may well be necessary in a permanent curtailment plan, we do not believe we should prescribe one at this time.

J.A. at 242. The Commission's concern for human needs customers is clearly unnecessary. The stricken penalty provision carefully defined the term "unauthor-

[45] *See* § 20 of the Revised Tariff, J.A. at 233-34.

ized overruns" to exclude overruns taken for the purpose of fulfilling residential and small commercial requirements.[46] Consequently, the Commission's action cannot be sustained upon the stated reasoning.

We note that the passage quoted above makes vague reference to El Paso's past practices regarding penalties and to the "inappropriateness" of instituting such penalties in an interim plan. It is possible that these references were intended to state additional reasons for rejection of the penalty provisions. If so, we are of the opinion that such grounds are not sufficiently articulated so as to permit meaningful review here. This matter is remanded to the Commission, therefore, for further clarification of its reasons for deleting the penalty provisions of the El Paso tariff.

VI. Environmental Impact

The National Environmental Policy Act (NEPA) requires that, "to the fullest extent possible," each federal agancy shall issue a statement detailing the environmental impact of any major action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1970). Several parties in the present case take the position that the establishment of an interim curtailment plan is a major federal action requiring such an environmental impact statement. They charge that the Commission's failure to issue such a statement violates the statute. The Commission does not deny that Opinions 634 and 634-A constitute major federal actions, but contends that compliance with the Act was not "possible" within the meaning of the statutory phrase "to the fullest extent possible." The Commission acknowledges its duty to give a full accounting

[46] *Id.* § 20.2.

of the environmental impact upon issuance of its final permanent order. Its only contention here is that the same exigencies which prompted the issuance of an interim emergency curtailment plan prohibited full exploration of environmental problems prior to implementation of that plan.

This very question has been raised and decided in a similar case in the First Circuit. In *Atlanta Gas Light Co. v. FPC*, 476 F.2d 142, 150 (5th Cir. 1973), the duties of the Commission under the Natural Gas Act were held to supersede the procedural dictates of NEPA:

> The mandate of the NEPA on federal agencies is that they comply with the procedural duties imposed by the Act to the fullest extent possible. See Calvert Cliff's Coord. Com. v. United States Atomic Energy Com'n, D.C. Cir. 1971, 146 U.S. App.D.C. 33, 449 F.2d 1109, 1114-1115. As there noted, the legislative history of the NEPA interprets "to the fullest extent possible" to mean compliance unless compliance would give rise to a violation of statutory obligations. As *Louisiana Power & Light Co.*, supra, makes clear, the Federal Power Commission has a statutory duty to the public under the Natural Gas Act to take effective interim curtailment action in the exigencies presented by gas shortages. We cannot say that the NEPA suspends this duty of the Commission.

We think this reasoning is correct and dispositive. In the present case, the Commission's duty under the Natural Gas Act to prevent discriminatory practices in

times of gas shortage called for prompt action. This created the type of "statutory conflict" which alone can excuse compliance with section 4332(2)(c). *Calvert Cliffs' Coordinating Committee v. A.E.C.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

Edison and SoCal attempt to distinguish *Atlanta Gas* on the ground that the time constraints at work in that case are absent here. Both parties note that in *Atlanta Gas* a revised tariff was filed in November 1971 indicating that immediate curtailment was required for the 1971-72 winter heating season. By contrast, El Paso's initial filing preceded issuance of the interim plan by some sixteen months, ample time for preparation of an environmental impact statement. This distinction is misleading. El Paso's original filing (July 6, 1971), which is still pending before the Commission, did not request interim action by the Commission. Rather, it contemplated the approval of a final permanent curtailment plan after full hearings. It was not until August of 1972 that El Paso requested an interim order regulating curtailments for the 1972-73 heating season, by then only a few months away.

Our discussion of this issue would not be complete without the following caveat. A federal agency which seeks to excuse itself from its duties under section 4332 (2)(C) cannot do so by simply ignoring that statute. Rather, it must make express findings which demonstrate the "statutory conflict" which prohibits compliance. *Cf. Calvert Cliffs' Coordinating Committee v. AEC, supra*, 449 F.2d at 1115; *Scientists' Institute for*

Public Information, Inc. v. AEC, 481 F.2d 1079, 1094 (D.C. Cir. 1973). Opinion 634, standing alone, does not meet this requirement. We think this defect is cured, however, by paragraph 10 of the clarifying opinion, No. 634-A.[47]

VII. Summary

We hold that the Commission has authority under section 5(a) of the Natural Gas Act to establish, by interim order, a temporary curtailment plan based upon end use. This authority is not restricted by contractual arrangements among pipeline companies and their customers. The Commission's finding that the former curtailment plan was discriminatory and its determination to postpone consideration of preexisting gas shortages in the California market and to subordinate industrial uses of gas to residential and commercial uses are affirmed. Its determinations with regard to grouping, storage withdrawals, boiler fuel uses, annual volumetric limits and penalties for overruns are reversed for the reasons stated in this opinion. We further hold that the Commission's failure to issue an environmental impact statement at the time the interim plan was established did not violate NEPA, 42 U.S.C. § 4332(2)(C). This matter is remanded to the Commission for further proceedings consistent with this opinion. In order to insure orderly administration of gas curtailments, the Commission may

[47]We note that over a year has passed since the implementation of the interim plan and that the plan has been extended indefinitely by the Commission's order of October 18, 1973. To the best of our knowledge, no environmental impact statement has yet been filed. It should be understood, however, that our ruling today is not a license for permanent or prolonged evasion of responsibilities under NEPA. If it becomes clear that the Commission's non-complaince is attributable to motives other than statutory impossibility, interested parties will not be barred by this opinion from seeking appropriate relief.

continue the interim order in effect for a reasonable period of time pending its decision regarding the matters remanded for further consideration.

So ordered.

FAHY, *Senior Circuit Judge:* I concur except with respect to the scope of the remand. Upon my study of the record I conclude that the court should not disturb the Commission's interim plan regarding those parts thereof designated as follows in the court's opinion: (B) Withdrawals from Storage, (E) Volumetric Limits, and (F) Penalties. I would not require further consideration of these three subjects. In all other respects I concur in Judge Tamm's opinion for the court.

APPENDIX B.

Opinion and Order Prescribing Interim Emergency Curtailment Plan.

PART I

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO. 634

El Paso Natural Gas Company

Docket No. RP72-6

Issued: October 31, 1972

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

El Paso Natural Gas Company

Docket No. RP72-6

OPINION NO. 634

APPEARANCES

C. Frank Reifsnyder, G. Scott Cuming, Walter G. Henderson and *Donald Snow* for El Paso Natural Gas Company

William R. Duff and *Henry E. Brown* for El Paso Electric Company; Magma Copper Company; Phelps Dodge Corporation; Salt River Project Agricultural Improvement and Power District

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Robert W. Tollen, Sherman Chickering, C. Hayden Ames, and *Donald J. Richardson* for San Diego Gas and Electric Company

David D. Mix, John D. Maharg, and *John W. Whitsett* for Air Pollution Control District of the County of Los Angeles

Walter F. Wolf, Jr., for The Navajo Tribal Utility Authority

Rufus G. Thayer, Jr., Lawrence O. Garcia, and *Mary Moran Pajalich* for The People of the State of California and The Public Utilities of the State of California

Mrs. Lilyan Goode Sibert and *Renn C. Fowler* for General Services Administration, Office of General Counsel

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William S. Martin, Jr., for The City of Lordsburg, New Mexico

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Robert T. Hall and *N. H. Powell* for Arizona Public Service Company

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Thomas F. Brosnan and *A. Y. Holesapple* for Tucson Gas and Electric Company

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Timothy M. Kelleher, Daniel E. Gibson, Frederick T. Searls, and *Malcolm H. Furbush* for Pacific Gas and Electric Company

William G. Riddoch, Thomas G. Johnson, and *Dan A. Bruce* for Shell Oil Company

Heber P. Hardy for Public Service Commission of Nevada

George Mabry for Johns-Manville Corporation and seven Nevada Industrial Customers of Southwest Gas Corporation

Douglas W. Fraser for New Mexico Public Service Commission

Edward J. Grenier, Jr., and *Richard C. Noland* for Johns-Manville Products Corporation

Kermitt L. Waters for the City of Las Vegas, Nevada

Platt Davis and *Jane Nix* for the Staff of the Federal Power Commission

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CURTAILMENT

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

El Paso Natural Gas Company

Docket No. RP72-6

OPINION NO. 634

OPINION AND ORDER PRESCRIBING INTERIM EMERGENCY CURTAILMENT PLAN

(Issued October 31, 1972)

WALKER, Commissioner:

1. This proceeding arises from a filing on July 6, 1971, by El Paso Natural Gas Company (El Paso) wherein El Paso proposed revised tariff sheets that would allocate its firm reliable main line capacity of its Southern Division System and provide new priorities of service to be used in the event that a gas supply shortage required curtailment of deliveries below that capacity. We suspended this filing for the full five month period and set the case for hearing. Hearings on the merits of this proposed permanent curtailment program have been held and that phase of this case is now pending before Presiding Administrative Law Judge Fribourg for his initial decision.

2. On August 17, 1972, El Paso filed a motion for the issuance of a Commission order prescribing interim emergency service rules and regulations to cover the curtailment of deliveries of natural gas on its Southern Division System for a period from November 1, 1972, until a final order is issued on its permanent curtail-

ment plan. On August 24, 1972, Salt River Project Agricultural Improvement and Power District (Salt River) filed a motion to reopen the proceeding in this docket for the purpose of allowing evidence concerning El Paso's gas supply. By order of September 1, 1972, we ordered that the record should be reopened for the limited purpose of taking evidence on the need for interim curtailment provisions and on the form such provisions should take. Hearings were held on these issues between September 12, 1972, and September 25, 1972. By our order of September 7, 1972, we also ordered that consideration be given to the claim of the City of Wilcox, Arizona (Wilcox) and Arizona Electric Power Cooperative (AEPCO) for extraordinary interim relief from the operation of any curtailment plant put into effect by El Paso. Because of the urgent nature of this proceeding on October 2, 1972, we granted a motion by El Paso for an order directing the Presiding Administrative Law Judge to certify the record on the interim curtailment procedures directly to the Commission for our decision. Briefs and reply briefs were filed on October 3, 1972, and October 10, 1972, respectively and the entire record and the briefs are now before us for decision.

3. Essentially the main issues now before us are whether we have authority to issue an interim emergency service rule, whether the facts indicate that such an emergency rule is necessary and if so which of the several plans proposed is most appropriate for the interim period.

4. Our authority to effectuate curtailment plans of interstate pipelines for deliveries to direct customers as well as sales for resale has been affirmed. *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

As noted by the Supreme Court, the Commission has emergency authority to issue interim orders effecting a curtailment plan. *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 644, note 18. While that affirmance was based primarily upon a tariff filing under Section 4 of the Natural Gas Act, we are also operating pursuant to Sections 5 and 16 of the Act in this case. As found below, without an interim curtailment plan the interests of El Paso's customers would be adversely affected. The exigencies of the situation, i.e. gas shortage and equities of El Paso's customers in this proceeding require prompt Commission action and a refusal to act would result in "gaps for private interests to subvert the public walfare." *F.P.C. v. Louisiana Power & Light Co., supra; F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-20, 23 (1961). We are also exercising the flexibility of authority delegated to us pursuant to Section 16 of the Act. *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968); *Mobil Oil Corp. v. F.P.C.*, D.C. Cir. No. 71-1260, October 6, 1972. *Cf. F.C.C. v. Schreiber*, 381 U.S. 279, 288-91 (1965); *Mesa Petroleum Co. v. F.P.C.*, 441 F.2d 182, 187 (5th Cir. 1971). Thus, the purposes for which the Natural Gas Act were established, e.g., to provide adequate service to consumers at the lowest reasonable rate, Section 5 and 16 of that Act and applicable judicial interpretations are the bases upon which we are acting to promulgate an interim curtailment rule for El Paso, pending adjudication of a final plan in the hearings below. Our adoption of the interim plan, while based upon the record certified to us, is more in the form of an interim emergency "rule"; but this rule will have the same legal effect and force as an approved curtailment plan under Order No. 431. See Opinion No.

606, 46 FPC ...., October 5, 1971, appeal docketed *sub nom. Mobile Gas Service Corp., et al. v. F.P.C.*, No. 71-1607, 5th Cir.

5. As interpreted by El Paso, its existing and currently effective tariff provisions customers would be curtailed in time of shortage in the following order, (a) best efforts gas; (b) irrigation gas; (c) direct industrial gas; (d) industrial gas of distributors east of California (EOC); (e) commercial gas of distributors EOC; (f) residential gas for distributors EOC; (g) gas sales to California customers under Rate Schedule G. Under this tariff provision no curtailment would take place to California customers until all EOC service had been curtailed. This means that both residential and commercial customers east of California would be cut off before any service to California was cut off. Almost all of the parties concede that under the present circumstances this would patently discriminate against the EOC customers. The supply evidence introduced by El Paso at the reopened proceeding clearly indicated that there was a real probability that curtailments under its presently effective tariff would result in cutting off not only commercial customers east of California but residential customers also, while California probably would be curtailed not at all. It is obvious that we would be negligent in our duties if we allowed human needs customers on any portion of the system to be cut off while industrial customers were still receiving gas on another portion of the system. We find that the currently effective plan of El Paso is discriminatory and violative of Section 4(b) of the Natural Gas Act.

6. At the reopened proceedings, El Paso witnesses showed that the original supply estimates presented in the main proceeding had not taken into account a re-

duction in casinghead gas volumes available to El Paso and also a decline in allowables, the watering out of wells, and difficulties with line pressures. The evidence clearly showed that on a peak day El Paso would undoubtedly have to curtail EOC customers to the point where residential service would be affected. In view of this, almost all of the parties to the proceeding agreed that some interim emergency plan should be put into effect and we certainly agree and so find.

7. At the hearing essentially four different interim curtailment plans were proposed by the various parties. These were proposed by El Paso, the Commission Staff, Johns Manville Products Corporation (JM), and by Southern California Gas Company (SoCal) with the concurrence of the Pacific Gas and Electric Company (PG&E). Various other parties to the hearings suggested variations of one or the other of the above plans or certain adjustments to the existing tariff which they felt would suit the situation. However, the above four are the only complete plans presented which we consider to be ready for implementation at this time. A brief description of each plan follows.

8. Under El Paso's proposed interim plan, which apparently is similar to its proposed long range plan, there are essentially two main steps. First El Paso would allocate its existing reliable main line capacity among each of its customers. The second step involves establishing a system of priorities in the event that El Paso is unable to deliver volumes equal to its reliable main line capacity. The priority step of El Paso's plan would involve the establishment of four priorities as follows, (1) domestic and residential consumers, (2) commercial consumers, (3) industrial consumers and direct industrial customers, and (4) direct industrial consumers

served under contracts between El Paso and such direct industrial customers presently or hereafter in effect and providing for a priority subordinate to the three stated above. To accomplish the necessary changes in service the El Paso proposal would require each of its customers to execute a new service agreement effective for the interim period. EOC direct industrial customers wishing to remain in priority three would have to agree to pay 5¢/Mcf above the existing rate for the privilege of receiving gas on a firm basis. Gas not paid for in the above manner would be delivered under priority four.

9. The Commission Staff curtailment plan rather than using reliable main line capacity as the point of departure would rely on the delivery obligations in the existing contracts. Staff would also limit annual takes of EOC distributors and industrials to actual annual takes for the 12 months ended June 30, 1972, since the existing contracts do not provide for annual limitations. The priorities of service under the Staff plan would be based on end use as follows: (1) residential, small commercial (under 50 Mcf), and residential needs related to direct and indirect industrial sales; (2) large commercial and those volumes of industrial gas required for plant protection and feed stock or process gas; (3) all other industrial requirements. The Staff plan would also provide for emergency environmental considerations whereby customers could apply for emergency gas from El Paso based on certification by a local air pollution control agency that an emergency based on EPA guidelines existed.

10. JM proposed a curtailment plan which it believed would be least disruptive to ultimate gas consumers during the interim period while a permanent plan was worked out. JM would assign the lowest priority to gas

used as boiler fuel and within the boiler fuel category boilers with existing alternate fuel capacity would be ranked from the largest to the smallest to reflect their fuel efficiencies and curtailed from the largest to the smallest in that group. JM believes that such curtailment would take care of the immediate problem envisioned by El Paso and alternate fuel availability would be the real criteria for determining curtailments.

11. SoCal and PG&E believe that for this winter we can operate under El Paso's existing curtailment plan through the use of the storage capacity of SoCal and PG&E. Under this plan California distributors to the extent possible would allow El Paso to reduce deliveries to them during emergency periods and they would withdraw gas from their own storage to take up the difference. For this service, SoCal and PG&E would expect the gas to be redelivered within 6 months and also that El Paso would pay 30¢/Mcf for the gas taken from storage which purportedly represents the cost of one storage cycle.

12. We have carefully considered each of these plans and combinations thereof, keeping in mind that any plan ordered would be for the 1972-1973 winter only. We would emphasize that any plan ordered now is being adopted under the pressure of time and is not intended in any way to indicate the direction of the determination of a long range plan now pending before the Administrative Law Judge. Based upon a consideration of the record before us and the briefs and reply briefs filed by the various parties we find that the plan proposed by the Commission Staff would be the most equitable but also find that it should be modified to use a priority system less disruptive and more easily implemented. In so doing we are not requiring the in-

stallation of duel fuel capacity during the interim period. We do recognize that over the long term, the interim plan we have adopted may operate as a disincentive to the installation of alternate fuel capacities. In addition, we believe that in calculating these priorities for this interim period the storage withdrawal adjustments proposed by Staff adds an additional complication which should be eliminated.

13. In rejecting the El Paso proposal as an interim plan we note first that the El Paso proposal would require customers to enter into entirely new contracts for the interim period. To the extent possible, we believe existing relationships should be preserved until the long range permanent plan is ready to go into effect. In addition, we believe that the Staff plan gives greater consideration to end use while preventing the abuse of the interim curtailment procedures by any of the customers who under El Paso's plan could attach new residential and commercial customers. The discrimination between priority 3 and priority 4 customers is obvious in the El Paso plan.

14. Although we are not adopting the plan proposed by JM, we believe that its concepts based on end use and a minimum of disruption during the interim period are steps in the right direction. We have, therefore, given consideration to this plan in formulating our own.

15. With regard to the plan proposed by SoCal and PG&E we find that it would just be too little and too late. It would leave the presently effective El Paso curtailment plan as the only valid tariff and we have already found that that contains inequities far beyond anything we can continue to permit. In addition, the SoCal, PG&E plan does not assure service to human

needs customers but promises to do its best with what is available from storage. It would appear to be at best just a plan to assure California customers that they would be unaffected by any El Paso curtailments.

16. The necessary tariff provisions to carry out our determination made herein should be submitted by El Paso within 30 days and will be accepted subject to our approval as to form. These provisions will be in effect until October 31, 1973, or until a permanent plan is finally approved by this Commission, whichever is earlier. If curtailments are necessary prior to the filing of the interim provisions El Paso should curtail all industrials ratably.

17. The remaining question before us involves the claim of Wilcox and AEPCO for extraordinary relief and total exemption from any curtailment plan during the coming winter. AEPCO, supported by Wilcox, alleges that it is unable to purchase fuel oil sufficient to satisfy its projected electric generation requirements during the coming year if El Paso's curtailments are actually put into effect. Based on the record made by AEPCO, we cannot find that it is entitled to the relief which it claims.

18. The AEPCO evidence shows that it has current storage capacity of 2.8 million gallons of oil as an alternative fuel and that this storage is now filled. If maximum curtailments were to be in effect, this storage would fall far short of the necessary fuel needed by AEPCO. APECO claims that it has been unable to enter into a contract for the necessary additional fuel oil and that in any event the transportation of such fuel oil would be extremely difficult because of the location of AEPCO's plant. The record shows, however,

that AEPCO refused to enter into a contract with one supplier for 4 million gallons because the supplier would make monthly deliveries rather than at AEPCO's option. In addition, AEPCO was more given to excuses for not negotiating for additional fuel rather than proving a failure of a bona fide effort. In this connection we note that many of the other customers of El Paso such as the copper companies showed that they had been able to find alternative fuel supplies for the coming winter and we cannot find that AEPCO has exhausted all of its possibilities. AEPCO is, of course, free to renew its motion if at some later period it is able to make a more persuasive showing of an entitlement to the relief it seeks.

The Commission further finds:

(1) The currently effective curtailment provisions of El Paso's tariff are discrimnatory under Sections 4 and 5 of the Natural Gas Act and it is appropriate that interim curtailment provisions be substituted pending a final determination of permanent just and reasonable tariff provisions.

(2) For the interim period ending October 31, 1973, or the date of final Commission order in these proceedings, whichever is first, we prescribe the following categories of curtailment priorities for El Paso's Southern Division, which are found to be reasonable, necessary, appropriate and in the public interest. The basic objectives of these categories are (1) to protect deliveries for residential and small volume commercial consumers who cannot be safety curtailed on a daily basis and (2) to require, as the initial level of curtailment, reduction in deliveries for large volume boiler fuel applications where alternate fuels are available:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day) and residential needs associated with industrial requirements served directly or indirectly.

Priority 2. Large commercial requirements and industrial requirements for plan protection, feedstock and process needs.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capability is present.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day) boiler-fuel use where existing alternate fuel capability is present.

(3) Delivery reduction in each subordinate priority shall be complete before deliveries for requirements in a higher priority are curtailed.

(4) Industrial requirements of El Paso's direct and resale customers shall be curtailed ratably within each priority.

(5) Curtailment shall be implemented daily as required by operating conditions on the Southern Division.

(6) A daily limitation on sales shall be imposed consistent with the Maximum Daily Delivery Obligation as provided within the currently effective east-of-California contracts and service agreements. The California customers are adequately limited at present by the Maximum Daily Contracted Demand of the existing agreements.

(7) Determination of El Paso's share of the California market for purposes of this interim curtailment plan shall not include a component for storage gas attributable to any previous delivery by El Paso.

(8) Implementation of our plan will require certain market data which El Paso may not have in the required form. El Paso shall secure all data necessary to effectuate compliance herewith, and shall file interim tariff provisions consistent therewith, acceptable to the Commission, on or before November 30, 1972.

(9) In the event El Paso should need to curtail deliveries for any reason before November 30, 1972, it shall be required as part of the emergency procedure to implement ratable curtailment of the industrial component of its direct and resale markets, including El Paso's share of the California market, using the best available data as a basis for determination of industrial requirements; and shall protect residential and small commercial consumers.

(10) The motion of Wilcox and AEPCO for extraordinary relief should be denied.

The Commission orders:

(A) El Paso shall file revised tariff sheets consistent with the above findings within 30 days which, subject to our approval shall become effective immediately upon filing.

(B) Such tariff sheets shall be effective until October 31, 1973, or until a permanent curtailment provision is approved, whichever is earlier.

(C) Prior to filing the revised sheets any necessary curtailments shall be carried out under finding number 9.

(D) The motion by Wilcox and AEPCO for extraordinary relief is denied.

(E) The record certified to us by the Presiding Administrative Law Judge is remanded for his consideration in determining a permanent curtailment plan.
By the Commission.

[Seal]

Kenneth F. Plumb,
Secretary.

APPENDIX B.

Opinion and Order Clarifying Opinion, Denying Motions for Stay, and Denying Rehearing.

El Paso Natural Gas Company

PART II

DOCKET NO. RP72-6

OPINION NO. 634-A

Issued: Issued December 15, 1972

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

El Paso Natural Gas Company

Docket No. RP72-6

OPINION NO. 634-A

OPINION AND ORDER CLARIFYING OPINION, DENYING MOTIONS FOR STAY, AND DENYING REHEARING.

WALKER, Commissioner:

1. Since we issued our Opinion No. 634 on October 30, 1972 prescribing interim curtailment plan for El Paso Natural Gas Company (El Paso) a number of the parties to the proceeding have made various filings requesting stays, clarification, modification and rehearing. Attached as Appendix A to this Opinion is a chronological list of the various filings we have received in connection with Opinion No. 634. On November 29, 1972 we issued an order staying the effec-

tive date of the filing to be made by El Paso on November 30, 1972 until such time as we could consider the many filings made by the parties. On November 30, 1972 El Paso filed the revised tariff sheets as required by Opinion No. 634 and we now have that tariff as well as the many filings before us.

2. Many of the filings contain arguments made to us prior to the issuance of Opinion No. 634 and in most cases we see no reason to discuss these all over again. However, certain of the filings raise questions which we believe merit further discussion and in some cases clarification with regard to our meaning in Opinion No. 634.

3. In its motion of November 20, 1972 for partial stay or immediate clarification, El Paso contends that certain ambiguities are present in our opinion which require clarification before the tariff sheets may be implemented. Four questionable areas were noted by El Paso as requiring immediate clarification in order to proceed with the curtailment plan as ordered. These areas concern primarily the lowest categories of service since this is the service that will be immediately affected by the curtailments.

4. The four areas of concern and El Paso's interpretation are as follows:

(a) *Alternate Fuel Capabilities:* El Paso believes that there may be some ambiguity in the use of the terms "alternate fuel capabilities" and "alternate fuel facilities." El Paso questions whether an industrial customer having alternate fuel facilities in existence should be regarded as having "existing alternate fuel capability." The revised tariff sheets will utilize the term "where existing alternate fuel facilities are present" in the definition of Priorities 4 and 5.

(b) *Boiler Fuel Use:* According to El Paso, several customers have raised the question as to whether or not the term "boiler fuel use" as it appears in the definition of Priority 4 and 5 service included that used for gas-powered turbines utilized for electric generation and any other direct fired application wherein alternate fuel capabilities exist. The revised tariff sheets will indicate that Priorities 4 and 5 do *not* include the above uses within the definition of boiler fuel.

(c) *Requirement v. Scheduled Deliveries:* El Paso questions the reference to the word "requirement" as meaning total "all out" requirement or scheduled use on a given day. In this regard El Paso has interpreted the Commission to mean those quantities which the customer would schedule for deliveries. Thus the revised tariff sheets will provide for "scheduled deliveries up to the Maximum Daily Delivery Obligation."

(d) *Grouping of Individual Delivery Point Delivery Obligation:* El Paso believes that a literal interpretation of the statement "Maximum Daily Delivery Obligation, as provided within the currently effective east-of-California contracts and service agreements" might preclude it from utilizing a customer's individual delivery point quantities at other delivery points where such quantities could best be utilized. However, the revised tariff will provide for such flexibility.

5. With respect to item (a), El Paso is correct in the use of the term "alternate fuel facilities." A review of the staff plan and testimony which was adopted by

us indicates that El Paso's interpretation is consistent with the position and intent of staff in advocating its plan. We realize that there may be situations where alternate fuel facilities exist but for good reason the capability does not exist. As noted in other curtailment cases, any party who finds itself in a position such as this and can clearly show the Commission that such a situation exists is free to ask for extraordinary relief at any time.[1]

6. With respect to item (b) (Boiler Fuel Use), we note that this pertains to the portion of the interim curtailment plan attributable to the proposals of the Johns-Manville witness and we realize there is no clear cut statement by either staff or the Johns-Manville witness as to the proper placement of gas turbine electric generation within the priorities of service as established by Opinion No. 634. While our basic intent in issuing Opinion No. 634 was to cause a minimum of disruption by curtailing large gas users with alternate facilities first, we are not ready to say at this time that gas powered turbines along with other direct fired applications should be considered boiler fuel for purposes of curtailment. Thus, we agree that El Paso has properly placed such uses in Priority 3. We would note, however, that this exclusion of these uses for Priorities 4 and 5 should not be used to divert boiler fuel to increased or new usage in turbines or direct fired applications during this interim period.

7. With regard to item (c), again we believe El Paso's interpretation is consistent with the staff position but it

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[1]As a part of their petition of November 30, 1972, the City of Willcox, Arizona, and Arizona Electric Power Cooperative, Inc. have included an amended motion for extraordinary relief. This will be set for hearing by separate order.

may also be that some further clarification is necessary since certain parties still seem to be confused as to its meaning. In providing that the basis for measuring curtailments will be the requirements up to the maximum of daily delivery obligation, it is our understanding and intent that this means whichever is the lesser. Thus the daily requirements will be used as a measure only if they are less than El Paso's maximum daily delivery obligation. In connection with this interpretation, we note that certain east-of-California parties who have not renegotiated their contracts with El Paso in recent years have been using substantial amounts of overrun gas to meet human needs requirements. This is made quite clear by the December 1, 1972 motion of the City of Mesa, Arizona for clarification or rehearing. Again we would note that where a party finds itself in a position such as that alleged by Mesa the door is open for a petition for extraordinary relief.

8. With regard to item (d), we find that the imposition of conjunctive billing as proposed by El Paso is not justified at this time, and could well result in increased industrial gas usage by those customers having a number of delivery points. Certainly it could result in discrimination against those customers, including California, who have only one delivery point. El Paso should eliminate this provision from the interim plan filed on November 30, 1972.

9. Two additional points raised by various parties which were not discussed in Opinion No. 634 involve annual limitations and overrun penalties. While we did not discuss or prescribe annual limitations in Opinion No. 634, we note that, consistent with the staff position at the hearing, El Paso has provided such limitations in its tariff filing based on the year ending July 1,

1972. Since this is consistent with the staff curtailment plan we expressly approve it. With regard to penalties for unauthorized overruns, we note that El Paso has never had them in its tariff and we do not consider it appropriate to institute them in an interim proceeding. As we also noted above, a number of customers have not recently revised their contracts and have been making substantial overruns for the use of human needs customers. While some provision for preventing unauthorized overruns may well be necessary in a permanent curtailment plan, we do not believe we should prescribe one at this time.

10. Another issue raised by a number of the parties regards our alleged failure to give adequate consideration to environmental matters in prescribing this interim curtailment plan. Our action in prescribing an interim plan was required as an emergency measure because of imminent curtailment on El Paso's system; in providing all parties with an opportunity to be heard before issuing an order, we spoke against the background of our August 22, 1972 order in this docket which stated, in part:

> We do not intend in any way to restrict the scope of our analysis of the environmental impact of El Paso's proposed curtailment plan. Environmental evidence will be presented in this case by any party so desiring. Environmental issues will be briefed with all other relevant issues. The process of analysis of environmental issues will be embodied in the Examiner's initial decision, and will be considered by the Commission, together with all relevant evidence in the record, before it issues its final decision in this and other curtailment proceedings.

In Opinion 634 we directed the filing of tariffs which permitted deviation from curtailment procedures when required by environmental problems. Those tariffs have now been filed and are in effect. For the reasons stated in our August 22nd order, and with regard to the limitations of time and the record before us, we concluded that our interim orders could go no further. We will continue to expect, however, the development of a complete environmental record in the hearings on El Paso's permanent curtailment plan, in accord with our August 22nd order.

11. Finally, many of the parties have made the point that as a result of this plan many customers who should be planning for alternate facilities will no longer have any incentive to do so. While we recognize that this may result, we would warn all customers that this is an interim plan only and those who should be installing alternate facilities but fail to do so are taking a substantial risk of being cut off with no alternative when a permanent plan is approved.

The Commission further finds:

(1) The assignments of error and grounds for rehearing or modification set forth in the various applications, petitions, and motions listed in Appendix A present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 634 and order issued October 10, 1972 except insofar as that Opinion and order have been clarified above.

(2) It is imperative that the interim curtailment plan be made effective at once and the various motions for stays should be denied.

The Commission orders:

(A) The interim curtailment plan ordered in Opinion No. 634 as filed by El Paso on November 30, 1972 is made effective on the date of the issuance of this Opinion and Order.

(B) The various applications, petitions and motions for stays, modification, and rehearing of Opinion No. 634 are denied.

By the Commission.

[Seal]

Kenneth F. Plumb,
Secretary.

APPENDIX A

El Paso Natural Gas Company, RP72-6 Opinion No. 634

11/16/72 Application of Nevada Power Company for rehearing.

11/20/72 Motion of El Paso Natural Gas Company for partial stay of Opinion No. 634, or in the alternative, for immediate clarification.

11/22/72 Application of Southern California Gas Company for rehearing, reconsideration and modification of Opn. No. 634 and motion for stay of the effectiveness of Opn. No. 634.

11/22/72 Application of American Smelting and Refining Company, Compania Minera de Cananea, S.A. De C.V., Inspiration Consolidated Copper Company and Kennecott Copper Corporation for rehearing.

11/24/72 Answer of City of Willcox and Arizona Electric Power Cooperative, Inc. to motion of El Paso of 11/20.

11/24/72 Answer of Johns-Manville Products Corporation to motion of El Paso of 11/20.

11/24/72 Answer of Shell Oil Company to motion of El Paso of 11/20.

11/27/72 Application of San Diego Gas & Electric Company for rehearing, reconsideration, and modification of Opn. No. 634.

11/27/72 Motion of San Diego Gas & Electric Company for stay of Opinion No. 634.

11/27/72 Answer of San Diego Gas & Electric Company to motion of El Paso of 11/20.

11/27/72 Answer of Arizona Public Service Company to motion of El Paso of 11/20.

11/27/72 Response of American Smelting and Refining Company, et al. to motion of El Paso of 11/20.

11/28/72 Answer of Tucson Gas & Electric Company to motion of El Paso of 11/20.

11/27/72 Telegram—Southern California Gas Company—partial response to motion of El Paso—decision should be modified as set forth in Southern California's application for rehearing and motion for stay mailed 11/20/72.

11/29/72 Application for rehearing of the People of the State of California and the Public Utilities Commission of the State of California.

11/29/72 Application for rehearing of Opinion No. 634 by Southern California Edison Company.

11/29/72 Motion of Southern California Edison Company for stay of Opinion No. 634 or in the alternative rejection of tariff schedules which El Paso proposes to file on or before 11/30/72.

11/30/72 Application for rehearing of The Department of Water and Power of the City of Los Angeles.

11/30/72 Application for Rehearing of Pacific Gas & Electric Company.

11/30/72 Application of the Air Pollution Control District of the County of Los Angeles for Rehearing, Reconsideration, and Modification of Opinion No. 634 and the Accompanying Order.

11/30/72 Petition of City of Willcox and Arizona Electric Power Cooperative, Inc. for Rehearing, Modification of Opinion No. 634, Motion for Stay, and Amended Motion for Extraordinary Relief.

12/1/72 Motion of City of Mesa for Immediate Clarification of Opinion No. 634, or in the Alternative for Rehearing.

12/5/72 Response of American Smelting and Refining Company, Campania Minera De Cananea, S.A. De C.V., Inspiration Copper Company and Kennecott Copper Corporation to Motions to Stay Opinion No. 634 and Accompanying Order.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

No. 73-1016

September Term, 1973

SAN DIEGO GAS AND ELECTRIC COMPANY.
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

JOHNS-MANVILLE PRODUCTS CORP.
GENERAL MOTORS CORP.
TUCSON GAS & ELECTRIC CO.
SHELL OIL CO.
SOUTHERN UNION GAS CO.
SOUTHWEST GAS CORP.
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT
EL PASO NATURAL GAS CO.
ARIZONA PUBLIC SERVICE CO.
SOUTHERN CALIFORNIA EDISON CO.
PEOPLE OF THE STATE OF CALIFORNIA
AND THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA
Intervenors

No. 73-1040

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner

v.

FEDERAL POWER COMMISSION,

Respondent

GENERAL MOTORS CORP.
JOHNS-MANVILLE PRODUCTS CORP.
TUCSON GAS & ELECTRIC CO.
SHELL OIL CO.
SOUTHERN UNION GAS CO.
SOUTHWEST GAS CORP.
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT
EL PASO NATURAL GAS CO.
ARIZONA PUBLIC SERVICE CO.
SOUTHERN CALIFORNIA EDISON CO.
PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
SAN DIEGO GAS & ELECTRIC CO.

Intervenors

No. 73-1042

SOUTHERN CALIFORNIA GAS COMPANY,

Petitioner

v.

FEDERAL POWER COMMISSION,

Respondent

GENERAL MOTORS CORP.

JOHNS-MANVILLE PRODUCTS CORP.

TUCSON GAS & ELECTRIC CO.

SOUTHERN UNION GAS CO.

SOUTHWEST GAS CORP.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT

SHELL OIL CO.

EL PASO NATURAL GAS CO.

ARIZONA PUBLIC SERVICE CO.

SOUTHERN CALIFORNIA EDISON CO.

PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION AND THE STATE OF CALIFORNIA

SAN DIEGO GAS & ELECTRIC CO.

AMERICAN SMELTING & REFINING CO., ET AL.,

Intervenor

No. 73-1116

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF WILLCOX AND ARIZONA
ELECTRIC POWER COOPERATIVE, INC.,
Petitioners

v.

FEDERAL POWER COMMISSION,
Respondent

AMERICAN SMELTING & REFINING CO., ET AL.
JOHNS-MANVILLE CORP.
GENERAL MOTORS CORP.
EL PASO NATURAL GAS CO.
SAN DIEGO GAS & ELECTRIC CO.
SOUTHERN UNION GAS CO.
Intervenors

Before: Fahy, Senior Circuit Judge; and Tamm and MacKinnon, Circuit Judge

Filed: Feb. 25, 1974.

ORDER

On consideration of: the petition for rehearing filed by San Diego Gas and Electric Company for rehearing; the petition for rehearing filed by Pacific Gas and Electric Company; the petition for rehearing filed by Southern California Gas Company; and the petition of City of Willcox and Arizona Electric Power Cooperative, Inc., for rehearing, it is

ORDERED by the Court that each of the aforesaid petitions is denied.

Per Curiam

For the Court:
/s/ Hugh E. Kline
Hugh E. Kline
Clerk

APPENDIX D.

Natural gas Act of 1938, §§4, 5, 19(b), 52 Stat. 822, 823, 831, as Amended, 15 U.S.C. §§717c, 717d, 717r(b):

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, to-

gether with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company 1a or upon its own initiatve without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period

than five months beyond the time when it would otherwise go into effect; 1a and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. §717c]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the

transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. §717d]

REHEARING; COURT REVIEW OF ORDERS

Sec. 19. * * *

* * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained or was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evi-

dence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U.S.C. § 717r]

COURT, U. S.

FILE

JUN 21

MICHAEL RODAK, JR

Nos. 73-1772, 73-1776, 73-1790, 73-1825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

SOUTHERN CALIFORNIA GAS COMPANY, ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN SMELTING AND REFINING COMPANY, COMPANIA MINERA DE CANANEA, S.A. de C.V., INSPIRATION CONSOLIDATED COPPER COMPANY AND KENNECOTT COPPER CORPORATION IN OPPOSITION

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June, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

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JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1974. Petitions for rehearing were denied on February 25, 1974. The petitions for a writ of certiorari in Nos. 73-1772, 73-1776, 73-1790 and 73-1825 were filed on May 24, 1974, May 28, 1974, May

29, 1974 and June 3, 1974 respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the National Gas Act, 15 U.S.C. § 717r(b). Because the petitions in Nos. 73-1790 and 73-1825 were not filed within the time specified in 28 U.S.C. § 2101(c), those petitions are jurisdictionaly defective.

QUESTIONS PRESENTED

1. Whether issues raised by interim curtailment orders issued by the Federal Power Commission and soon to be replaced by permanent orders are moot.

2. Whether the Federal Power Commission acted properly in prescribing a non-discriminatory interim curtailment plan to be observed by El Paso Natural Gas Company after finding that El Paso's then effective plan was discriminatory.

3. Whether the Federal Power Commission was required to issue an Environmental Impact Statement before responding to the imminent emergency on El Paso Natural Gas Company's system.

STATEMENT

El Paso Natural Gas Company is a natural gas company subject to the jurisdiction of the Federal Power Commission. El Paso's Southern Division System, which extends from Texas to the Eastern borders of California, supplies all the natural gas requirements of several distributor and direct industrial customers located in the States of Texas, New Mexico, Arizona and Nevada and a portion of the requirements of two California distributors, Pacific Gas

and Electric Company (PG&E) and Southern California Gas Company (SoCal), which in turn sell gas for residential, commercial and industrial use.

The East of California direct industrial customers include respondents American Smelting and Refining Company, Compania Minera de Cananea, S.A. de C.V., Inspiration Consolidated Copper Company and Kennecott Copper Corporation (ASARCO, *et al.*), which are generally engaged in the mining and smelting of copper ores in the States of Texas, New Mexico and Arizona and in Northern Mexico. ASARCO, *et al.*, have purchased their natural gas requirements from El Paso since the 1940's pursuant to long term firm contracts requiring El Paso to deliver the smelters' natural gas requirements up to certain specified daily amounts. The operations of these companies contribute significantly to the economy of the Southwestern United States and Northern Mexico.

Pursuant to Commission Order No. 431, 36 Fed. Reg. 7505, El Paso filed in May, 1971, proposed changes in the curtailment procedures set forth in its FPC Gas Tariff. Hearings were ordered by the Commission on the proposed changes and were completed in June, 1972. In August, 1972, while the matter was being briefed to the presiding Administrative Law Judge, El Paso, anticipating a need to impose service curtailments beginning November 1, 1972, but not wanting to do so pursuant to either its existing procedures or its proposed revisions—at least before they were sanctioned by the Commission—requested the Commission to prescribe interim procedures to govern curtailments on its Southern Division System until a permanent plan was settled on.

Hearings were reconvened on the need for and the form of interim curtailment procedures. Following briefing, the Commission issued Opinion No. 634, 48 F.P.C. 931 (1972), which found, initially, that El Paso's existing procedures required that curtailments be imposed in the following order:

> "(a) best efforts gas; (b) irrigation gas; (c) direct industrial gas; (d) industrial gas of distributors east of California (EOC); (e) commercial gas of distributors EOC; (f) residential gas for distributors EOC; (g) gas sales to California customers under Rate Schedule G." 48 F.P.C. at 934.

The Commission concluded that this curtailed scheme [1] was unlawful and ordered El Paso, pending approval of a permanent plan, to curtail gas deliveries ratably to all its customers on the basis of the following end use priorities, with the lowest priority to be curtailed first:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day) and residential needs associated with industrial requirements served directly or indirectly.

Priority 2. Large commercial requirements and industrial requirements for plant protection, feedstock and process needs.

---

[1] While ASARCO, *et al.*, do not agree with the Commission's interpretation of the prior procedures, the Commission acted properly on that interpretation, and therefore the result reached was correctly affirmed by the Court of Appeals. For this reason, among others, ASARCO, *et al.*, oppose the untimely petition filed by the City of Willcox and the Arizona Electric Power Cooperative, Inc.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capability is present.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day, but more than 1,500 Mcf per day) where existing alternate fuel capability is present. 48 F.P.C. at 939.

After the Commission denied rehearing, 48 F.P.C. 1369, several parties initiated review proceedings in the Court of Appeals.

Although it remanded certain specific features of the interim program to the Commission, the Court of Appeals for the District of Columbia Circuit affirmed the Commission's conclusion that El Paso's existing procedures were unlawful and upheld the Commission's authority to prescribe end use curtailment priorities to be applied ratably to all customers of the pipeline. Several petitions for rehearing were denied and petitions by PG&E, SoCal and San Diego Gas & Electric Company, a customer of SoCal (the California petitioners), and by the City of Willcox and Arizona Electric Power Cooperative, Inc. (AEPCO), followed.

ARGUMENT

A. The Petitions Raise Issues Which Will Be Mooted in the Near Future.

The petitions concern Commission orders which specifically are to remain in effect only until such time as a permanent curtailment plan is prescribed by the

Commission. On June 14, 1974, the Commission issued its Opinion No. 697, prescribing a *permanent* curtailment plan to be followed by El Paso. Pursuant to Ordering Paragraph I, Opinion No. 697 will become effective "within 60 days after its issuance, or, in the event applications for rehearing are filed, upon the date of a final order on rehearing in this proceeding, whichever is the later." Issues raised by the interim plan will thus be mooted in the very near future, and the petitions should accordingly be dismissed when Opinion No. 697 becomes effective. *De Funis* v. *Odegaard*, — U.S. —, 42 U.S.L.W. 4578 (1974); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). If the permanent curtailment plan contains features which petitioners deem unsatisfactory, they may seek judicial review thereof pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b).

B. In Upholding the Commission's Interim Orders, the Court of Appeals Did Not Deviate From This Court's Decisions.

In upholding the Commission's action, the Court of Appeals did not deviate at all from the decisions of this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621; *Permian Basin Area Rate Cases*, 390 U.S. 747 (1969); or *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1955), concerning the Commission's obligations in curtailment proceedings or its duty to set asde contractual provisions inimical to the public interest. Neither does the Court of Appeals' decision create a conflict with another circuit, as some petitioners suggest. Accordingly, the several petitions should be denied.

In *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court held that Sections 1(b) and 16

of the Natural Gas Act, 15 U.S.C. §§ 717(b) and 717o, conferred on the Commission broad authority to regulate service curtailments by pipelines subject to its jurisdiction. *Id.* at 638, 642. The substantive standard for evaluating curtailment programs, it was held, was Section 4(b), which provides:

> "(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

Also important to this case is Section 5(a) of the Act, which was invoked by El Paso's August, 1972, motion and provides in relevant part as follows:

> "(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: . . ."

The California petitioners do not seriously contend that the Commission erred in concluding that El Paso's existing curtailment procedures were unlawfully discriminatory.[2] Nor do they argue that the interim non-discriminatory pro rata curtailment procedures promulgated by the Commission are violative of Section 4(b). For neither of these positions would be supportable in fact or in law.

What the California petitioners do urge, however, is that the Commission went too far in remedying the undue discrimination embodied in El Paso's existing curtailment procedures. After assuring that gas service to EOC residential and commercial customers would be given the same priority as similar service in California, they say, the Commission should simply have let El Paso curtail industrial service in accordance with its existing procedures. Under El Paso's and the Commission's interpretation of those procedures,[3] all service to East of California direct industrials would have been curtailed for much of the 1972-

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[2] SoCal argues that the Commission's findings that there was a substantial likelihood that curtailment of EOC residential or commercial requirements would occur was not supported by the evidence. SoCal's position rests solely on El Paso's estimate of *average* day, rather than *peak* day, curtailments of EOC residential or commercial requirements. El Paso's evidence was that on extremely cold days, which might occur for four or five consecutive days, there would be curtailment of 226,000 Mcf of residential-commercial service. (R. 6698; 9561.) While the Court of Appeals noted that there was no certainty that this would result in curtailment of residential service, it affirmed, as supported by substantial evidence, the Commission's conclusion that residential and commercial service together would be curtailed on very cold days. (Slip Op. at 25-28.)

[3] But see note 1 *supra*.

73 winter (and undoubtedly to an even greater extent in the 1973-74 winter), while industrials served by EOC distributors would have fared only slightly better. (R. 9561.) At the same time, PG&E and SoCal would have received, day after day, one-hundred percent of their contract entitlement, much of which would have been sold to industrial users. In short, the California petitioners were advocating disparate treatment by El Paso which would have favored its California indirect industrial customers at the expense of its East of California direct customers.

The complete answer to the position asserted by the California petitioners is that the Commission had an obligation to prescribe a nondiscriminatory curtailment plan for El Paso, not merely one which eliminated only the most objectionable features of the existing plan, *i.e.*, potential curtailment of EOC residential and commercial service before El Paso's deliveries to PG&E and SoCal were cut by 1 Mcf.[4] Section 5(a), which the Court has held may be used to implement the Commission's curtailment authority, *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 643, provides that after the Commission finds an existing tariff provision unlawful, it "shall determine the *just and reasonable* . . . rule, regulation, practice, or contract to be thereafter observed and shall fix the same by order . . ." (Emphasis added.) And, of course, in prescribing the plan, the Commission had to observe

[4] In addition to their grave concern regarding predicted curtailment of EOC residential-commercial service, the Commission and the Court of Appeals plainly considered the discriminatory, complete curtailment of gas deliveries to EOC industry to be a significant indication of the unlawfulness of El Paso's existing procedures. (48 F.P.C. at 934-35; Slip Op. at 28.)

the nondiscrimination requirements of Section 4(b). *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 642-43. In view of these governing criteria, it is readily apparent that the Commission did not act unlawfully in prescribing an end use curtailment plan which accorded similar treatment to all of El Paso's customers. Indeed, one wonders what other lawful order the Commission could have entered under the relevant statutory and case law.

The California petitioners' characterization of the Commission's action as (1) unjustifiably upsetting their contractual expectations of a firm gas supply and (2) unexpectedly shifting volumes of gas from industrial users in California to similar users in states East of California is simply inflammatory rhetoric which does not advance analysis of the issues. The EOC direct industrials, such as *ASARCO, et al.,* enjoy, under their contracts with El Paso, service which is no less firm than El Paso's gas service to PG&E and SoCal. The only difference is the not unusual provision, that being industrials, ASARCO, *et al.,* could be interrupted in emergency situations *to ensure continued service to the "domestic" customers served by El Paso's distributor customers.* (*E.g.* R. 10725-26, 10761-62, 10888-89, 10941-42). ASARCO, *et al.'s* contracts do *not* provide that service to them can be cut off permanently merely to ensure continued gas deliveries to PG&E and SoCal for redelivery to their large steam electric generating plant customers.

The hard fact is that the severe and worsening natural gas shortage currently affecting the United States as a whole and El Paso in particular has resulted in the frustration of the contractual expecta-

tions of all of El Paso's firm customers, whether located in California or in States to the East. Those customers, including ASARCO, *et al.*, had relied on a continuing adequate supply of gas from El Paso in making plans, commitments and capital investments. That El Paso's gas shortage has demonstrated that such reliance was unjustified is hardly a sufficient reason for adopting the California petitioners' suggestion that the entire burden of the shortage be borne by EOC customers.[5]

It was the Commission's unenviable task to devise in a short time interim procedures which would spread the shortfall between supply and demand in a nondiscriminatory and nonpreferential manner. In issuing its Orders designed to accomplish this goal, the Commission did not set aside the California petitioners' contractual expectations to any greater degree than it did those of the EOC customers and did not, as the California petitioners urge, shift volumes of gas from California to the East. Rather, the Commission simply ordered that El Paso's systemwide shortage be apportioned ratably among those served by that system, and, as a result, *all* customers are receiving *less* gas than they are contractually entitled to.

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[5] Even assuming the validity of El Paso's view of its existing procedures (although El Paso historically had not acted in accordance with that view), the procedures were not in conformity with the contract rights of ASARCO, *et al.* In any event, curtailment procedures historically utilized only during severe winter weather conditions when El Paso's pipeline capacity was insufficient to satisfy all of its customers' contract entitlements were hardly dispositive when the Commission undertook to devise procedures for dealing with severe daily curtailments resulting from a chronic gas supply shortage.

In view of the foregoing, it is plain that the Commission did not deal any differently with the California petitioners' contract rights than it did with those of, for instance, ASARCO, *et al.* In any event, the Commission certainly has the inherent authority to set aside, in connection with the exercise of its curtailment authority, contractual provisions subject to its jurisdiction which it finds are not in the public interest. *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 646; *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* 350 U.S. at 344; *Permian Basin Area Rate Cases, supra,* 390 U.S. at 784. Utilizing these standards, it was entirely appropriate for the Commission to set aside the contracts between El Paso and PG&E and SoCal to whatever extent they may have provided that gas would be delivered to PG&E and SoCal for resale to industrial consumers while deliveries to the firm EOC industrials were being curtailed. Such an arrangement, which would result in gross discrimination between deliveries by El Paso for industrial gas consumers in California and States East of California, is clearly contrary to the public interest, especially in a time of acute gas shortage like that currently being experienced by El Paso's Southern Division System. In sum, one group of a pipeline's customers cannot be heard to invoke certainty of contract as a vehicle for preserving its own contract rights at the expense of those of another similarly situated group of customers.

C. The Court of Appeals' Decision Is Not in Conflict with International Paper Company v. Federal Power Commission.

The decision of the Court of Appeals is not in conflict with that of the Court of Appeals for the Fifth Circuit in *International Paper Co.* v. *FPC,* 476 F.2d

121 (5th Cir. 1973). In that case, the court accepted as settled that a valid Commission curtailment order would, in and of itself, override and limit pro tanto the pipeline's contractual obligation to deliver so many cubic feet of gas per day. 476 F.2d at 123. Indeed, an impossible situation would result if this effect were not given Commission curtailment orders.

The Fifth Circuit then considered whether such an order would also automatically insulate the pipeline from all potential damage liability, either for failure to deliver the agreed upon quantities, or under substitute fuel clauses. It was only in connection with these latter issues, which were not raised in the proceedings below, that the Fifth Circuit required the specific findings which some petitioners suggest the Commission was required to make in this case.

Both the Fifth Circuit[6] and the D.C. Circuit[7] recognized the difference between the curtailment and damages issues, and the D.C. Circuit properly concluded that the Commission had not acted contrary to the *International Paper* decision.

In any event, the Commission has plainly made any findings arguably required by *International Paper*. The Commission found, based on substantial evidence, that El Paso's existing curtailment plan was unduly discriminatory (the converse of preferential) and that the curtailments required thereby (*i.e.*, cessation of *all* natural gas service East of California before 1 Mcf of curtailment to PG&E or SoCal) made abrogation

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[6] 476 F. 2d at 126-29.

[7] Slip Op. at 20-21.

of that plan necessary in the public interest. For these reasons, the decision below has created no conflict between circuits.

D. In the Circumstances Facing It, the Commission Was Not Required To Issue an Environmental Impact Statement.

Review should not be granted merely because the Court of Appeals upheld the Commission's decision to promulgate interim curtailment procedures without first issuing an Environmental Impact Statement or stating why it was impractical to do so. While ASARCO, *et al.*, believe that the National Environmental Policy Act, 42 U.S. § 4321 *et seq.*, requires the Commission to issue such a statement or explanation in conjunction with a *permanent* curtailment plan, the circumstances underlying the issuance of the *interim* plan—the need for expeditious action to ensure that anticipated service curtailments would be administered in a just and reasonable manner—simply precluded the Commission from considering the environmental issue beyond providing for an exemption from curtailment in environmental emergencies. A system shortage was about to materialize and the Commission could have done nothing to stave it off while it considered environmental matters. In these circumstances, the Court of Appeals properly concluded that the Commission was temporarily excused from complying with NEPA, which requires that, "to the fullest extent *possible*," [8] impact statements will be issued. *See also Atlanta Gas Light Co.* v. *FPC*, 476 F.2d 142, 150 (5th Cir. 1973).

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[8] 42 U.S.C. § 4332(2)(c) (emphasis added).

CONCLUSION

For the foregoing reasons, the several petitions for writs of certiorari should be denied.

Respectfully submitted,

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June, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1772, 73-1776, 73-1790, 73-1825

SOUTHERN CALIFORNIA GAS COMPANY,
PACIFIC GAS AND ELECTRIC COMPANY,
SAN DIEGO GAS AND ELECTRIC COMPANY,
CITY OF WILLCOX, *et al.*,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS
ARIZONA PUBLIC SERVICE COMPANY, SOUTHERN UNION
GAS COMPANY, SOUTHWEST GAS CORPORATION
AND TUCSON GAS & ELECTRIC COMPANY

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Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ARIZONA PUBLIC SERVICE COMPANY, SOUTHERN UNION GAS COMPANY, SOUTHWEST GAS CORPORATION AND TUCSON GAS & ELECTRIC COMPANY

Arizona Public Service Company, Southern Union Gas Company, Southwest Gas Corporation, and Tucson Gas & Electric Company, respondents herein and intervenors in the court below, oppose the captioned petitions for writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on January 21, 1974, in the matter styled *American Smelting and Refining Company, et al. v. Federal Power Commission.*

QUESTIONS PRESENTED

1. Whether the issues raised by interim emergency orders of the Federal Power Commission are moot by reason of the issuance of permanent orders superseding such?

2. Whether the Federal Power Commission's mandate under Sections 4(b) and 5(a) of the Natural Gas Act to proscribe undue discrimination in the curtailment of natural gas service is limited to protecting residential and commercial needs from preferential practices, or whether such obligation to insure non-discriminatory practices covers industrial needs as well?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 15 USCA, §717, *et seq.* are Sections 4(b) and 5(a) which provide:

Section 4

* * * * * *

"(b) No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 15 USCA §717c(b)

Section 5

* * * * * *

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas

distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: ***Provided, however,*** That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 15 USCA §717d(a)

STATEMENT

The instant matter involves orders of the Federal Power Commission (Commission) establishing interim emergency priorities and procedures to ration natural gas supplies on the Southern Division System of El Paso Natural Gas Company (El Paso), an interstate pipeline subject to the Commission's jurisdiction under the Natural Gas Act, ***supra***, pending the Commission's final decision upon the appropriate permanent prescription to govern curtailment of service. The controversy here involved concerns whether the Commission properly found that all customers served by El Paso should be curtailed in the same manner, or whether certain claimed contractual preferences should prevail.

Arizona Public Service Company, Southern Union Gas Company, Southwest Gas Corporation, and Tucson Gas &

Electric Company are natural gas distributors serving approximately 668,000 consumers throughout the so-called east-of-California region, consisting of west Texas, New Mexico, Arizona, and southern Nevada. El Paso's deliveries to the above-listed distributors pursuant to firm contracts constitute the sole source of natural gas available for resale to such consumers, except for certain quantities purchased by Southern Union Gas Company from other suppliers. In addition to such distributors' dependence upon El Paso for their resale requirements, Arizona Public Service Company and Tucson Gas & Electric Company are dependent upon El Paso's firm direct sale deliveries as their sole source of natural gas for their electric generation facilities, which provide electric energy to some 432,000 consumers.

The east-of-California region, presently consisting of 30 resale distributor customers and 21 direct sale industrials served by El Paso, has received firm service for over four decades. Such service commenced in the early 1930's as El Paso extended its pipeline facilities westward from the natural gas production areas in west Texas through southern New Mexico and Arizona to a point of termination near Phoenix, Arizona (R. 22).

The east-of-California region's dependence upon El Paso's deliveries has developed as a result of both the geology native to the region and El Paso's particular marketing practices. First, the major portion of the east-of-California market served from El Paso's system contains no significant hydrocarbon formations for use either as a source of supply or as storage for volumes to be later withdrawn for peak period needs (R. 1905). Second, by reason of El Paso's early marketing practice, all large-volume industrial requirements in the east-of-California region were served solely on a direct sale basis (R. 1705-1706), with the local distributors thus left to serve residential and small commercial users. As a result, contrary to normal distribution operations wherein a distributor purchases approximately the same quantity from its supplier each day and meets the varying demands of its

temperature-sensitive residential and commercial requirements by interrupting service to its industrial users or withdrawing volumes from underground storage, the east-of-California distributors' purchases necessarily vary with the weather. In recognition of these patterns of service, El Paso has rendered firm service to the east-of-California distributors pursuant to contracts which provide for the satisfaction of their full requirements and do not require a minimum annual level of purchases.

More than 15 years after the above-described service to the region east-of-California was initiated, El Paso extended service to the state of California. Such service, commencing in 1947 to petitioner Southern California Gas Company, which in turn sells to petitioner San Diego Gas and Electric Company, and in 1950 to petitioner Pacific Gas and Electric Company, follows a pattern wholly different than that rendered to the east-of-California region. The two California companies desired that a fixed volume of gas be delivered each day of the year since, unlike the necessarily weather-dependent demands of the east-of-California distributors, the varying demands of their temperature-sensitive residential and commercial users could be met by (1) interrupting service to the large industrial loads in their distribution territories, (2) withdrawing gas stored in large underground reservoirs, and (3) increasing takes from their other sources of supply (R. 22-23; 1763-1764; 7065-7066).

Since the California distributors now purchase approximately 80% of El Paso's annual sales volumes, the extension of service to the California distributors necessarily involved a many-fold expansion of El Paso's previously-existing transmission facilities. The Financial feasibility of such mammoth expansion rested upon the California distributors' representation that they would purchase at approximately 100% of their maximum daily contract entitlement. Hence, the contracts and rate schedules executed for such service provided for (1) a penalty, in the form of a minimum annual bill, to insure that, if such purchases dropped below 91% of contract entitle-

ment, El Paso would nonetheless recover its costs and (2) a rate incentive, in the form of a discount constructed such that each unit above 91% of contract entitlement cost successively less than the preceding unit, to encourage such distributors to purchase 100% of contract entitlement. Pursuant to such rate form, the California distributors have paid a lower unit rate, despite the greater transmission mileage involved, than many of the east-of-California customers.

While the firm service rendered to the two regions was thus vastly different, El Paso's then-existing tariff provisions governing curtailment of service, although disputed by the California petitioners, properly provided for a ***pro rata*** apportionment of any and all curtailment to both California and east-of-California requirements. As specifically referenced in El Paso's Rate Schedule G under which the California companies receive service, Section 11.2 of El Paso's then-existing tariff provided that El Paso's sales to the two California distributors would be curtailed on the same end-use basis as all other deliveries (R. 9781; 12687-12690).[1]

While El Paso's then-existing tariff provided for the ***pro rata*** curtailment of both regions, such tariff purported to distinguish El Paso's liability for curtailing the east-of-California customers' firm contractual demands from that liability accruing from the curtailment of the California distributors. With respect to curtailments occasioned by depletion of supply, Section 9A thereof purported to exempt El Paso from liability to the east-of-California customers, while Section 9B provided that El Paso would not be so exempted from liability as respects the California distributors (R. 9778-9779).

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[1]Section 11.2 states that "in the sale and distribution of natural gas in the States of Arizona, New Mexico, Texas and San Juan County, Utah, . . .", certain procedures govern curtailment (R. 9781). El Paso's sales to the California customers are made in Arizona, and, hence, are covered by Section 11.2's terms. Similarly, Southwest Gas Corporation's distribution operations in Nevada fall within Section 11.2, since El Paso's sales to such company are effected within Arizona.

Except on infrequent occasions during the nearly four decades on full requirements service rendered to the east-of-California region and the 25 years of service to the state of California, El Paso never had the need to utilize the curtailment provisions of such tariff, nor was there any inquiry as to the justness and reasonableness of either the tariff's curtailment provisions or El Paso's interpretation thereof (R. 27). Until 1972, El Paso did not curtail any of its distributor customers, except for isolated ***force majeure*** instances ***Ibid.*** On infrequent occasions of extreme peak demand during such period when El Paso's supplies were not sufficient to satisfy all of its customers' requirements, El Paso did not follow the plain reading of its then-existing tariff providing for the ***pro rata*** curtailment of the industrial requirements served by all of its customers. Instead, evidently mindful that the east-of-California distributors served virtually no industrial loads and equally mindful of the liability that would be incurred if the California distributors were curtailed, El Paso levied such minor curtailments solely upon its direct sale customers (R. 28). The direct industrial customers assumed that curtailment was being implemented on a ***pro rata*** basis to the industrial loads served by distributors, as well, on such occasions, and, hence did not question whether such infrequent, small-volume curtailments were implemented in accordance with the relevant contract and tariff provisions (R. 1444-1445).

In 1971, El Paso's supply projections indicated that the first prolonged and substantial curtailments to be experienced by its system would commence on November 1, 1973, and continue on a daily basis thereafter (R. 28). Consistent with the Commission's Order No. 431,[2] El Paso filed proposed

[2] "In April 1971 the Federal Power Commission (FPC) promulgated its Order 431 requiring every jurisdictional pipeline to report to FPC whether curtailment of its deliveries to customers would be necessary because of inadequate supply of natural gas. A pipeline anticipating the necessity for curtailment was required to file a revised tariff to control deliveries to all customers – industrial 'direct sales' customers, purchasing gas for their own consumption, and 'resale' customers, purchasing gas for distribution to ultimate consumers." ***Federal Power Commission*** v. ***Louisiana Power & Light Co., infra,*** at 406 US 621, 623.

tariff modifications on July 6, 1971, incorporating new curtailment provisions to cope with such supply deficiencies (R. 11406). In support of its proposed tariff revisions, El Paso alleged that under its interpretation of the then-existing tariff provisions – an interpretation apparently fully cognizant of its liability under such tariff for failure to deliver to the California distributors – that the east-of-California customers alone would bear the full burden of the first substantial curtailment to be experienced on its system, and its proposed modifications would eliminate such disastrously discriminatory result.

On August 17, 1972, after the conclusion of lengthy hearings before an administrative law judge on the proposed tariff revisions, but prior to the issuance of an initial decision by the judge, El Paso informed the Commission that its latest supply forecasts revealed that curtailments in the magnitude of 250,000 Mcf on the average day would commence by November 1972, rather than November 1973, as originally projected (R. 11940). Moreover, El Paso informed the Commission that it was unwilling to incur the risk of liability which might flow from implementing, prior to a Commission determination as to the justness and reasonableness of such, either (1) its proposed tariff revisions or (2) its interpretation of the curtailment provisions of its then-existing tariff (R. 11933-11938). Accordingly, El Paso requested that the Commission exercise its emergency authority under Section 5(a) of the Natural Gas Act to provide interim procedures to govern the administration of curtailment pending decision upon the appropriate permanent program (R. 1938-1944).

On October 31, 1972, the Commission issued its Opinion No. 634 (R. 13355-13368). Such opinion found that El Paso's interpretation of its then-existing tariff provisions, which placed all of such curtailment on the east-of-California customers, was an obvious violation of the basic protection against discrimination afforded by the Natural Gas Act (R. 13362). Faced with the impending onslaught of curtailment, the Commission prescribed interim emergency priorities and procedures providing for the ratable curtailment of all service

rendered by El Paso according to an order of end-use priorities. Pursuant to such order, all large boiler fuel end-use requirements with alternate fuel facilities were to be curtailed first, thereafter small boiler fuel requirements and other industrial requirements were to be curtailed as necessary, with small commercial and residential requirements the last to be reached by curtailment (R. 13367).

After the Commission denied rehearing of such decision (R. 13747-13754), the California distributors and other parties initiated review proceedings in the U.S. Court of Appeals for the District of Columbia Circuit. The California petitioners' principal contention was that the Commission's jurisdiction over curtailment during the interim period was limited to insuring adequate service to the east-of-California residential and commercial users, but that such curtailment jurisdiction did not extend to correcting the discrimination between the two region's industrial users.

While remanding certain aspects of the interim emergency orders, the Court of Appeals upheld the Commission's determination that El Paso's interpretation of its then-existing tariff provisions would result in gross discrimination against end-users in the east-of-California region, and that, to the extent that such interpretation was properly based on El Paso's then-existing tariff and contracts, the Commission may override such contractual provisions with a plan based upon the ratable curtailment of all end-uses.

REASONS FOR DENYING THE WRITS

As shown below, the reasons for denying the writs are twofold: (1) the issues raised by the petitioners are, or will be shortly, moot, and (2) the decision below is clearly correct.

I

THE ISSUES RAISED ARE MOOT

On June 14, 1974, the Commission issued its Opinion No. 697 prescribing permanent curtailment priorities and procedures to supersede the interim emergency orders involved herein, to be effective "within 60 days after its issuance, or, in the event applications for rehearing are filed, upon the date of a final order on rehearing in this proceeding, whichever is the later." (Mimeo, p. 35). Assuming that the issues raised by the petitioners are worthy of this Court's attention, such issues should be assessed in the context of the Commission's fully considered decision as to the appropriate permanent curtailment procedures, rather than on the basis of stop-gap interim emergency orders which have been, or shortly will be, superseded. The petitions, therefore, should be denied.

II

THE DECISION BELOW IS CLEARLY CORRECT

The decision below represents a straightforward application of this Court's holding in ***Federal Power Commission v. Louisiana Power & Light Company***, 406 U.S. 621 (1972). ***LP&L*** found that the Commission has comprehensive and all-pervasive authority under its Section 1(b) transportation jurisdiction to fully regulate the conduct of curtailment of interstate natural gas service. This Court found, further, that such plenary authority to prescribe uniform curtailment priorities and procedures is not fettered by contractual curtailment provisions negotiated by private parties, but is exercised according to public interest standards, 406 U.S. 621, 642-643:

> "The substantive standard governing FPC evaluation of curtailment plans is found in § 4(b) of the Act:

> 'No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.' 15 USC §717c."

LP&L further found that the substantially similar provisions of Section 5(a), under which the instant controversy arises, provides a second procedural mechanism to enforce the Natural Gas Act's sanctions against preference, ***Ibid.*** Thus constituted, "[t]he Natural Gas Act of 1938 granted FPC broad powers 'to protect consumers against exploitation at the hands of natural gas companies.' "

The controversy involved herein provides a classic demonstration of why Sections 4(b) and 5(a) provide the standard for curtailments rather than agreements between private parties. By conferring on El Paso's interpretation of its previously-existing tariffs the status of express contract provisions, the California distributors contend that they have obtained from El Paso a "contract right" to exemption from curtailment, while the east-of-California purchasers have not obtained such "contract right". The California petitioners concede, however, that to exempt all service to California from curtailment while curtailing residential and commercial requirements east-of-California would be grossly discriminatory. But such California distributors see no discrimination in an allegedly contract-based curtailment program which would curtail ***all*** industries dependent upon natural gas in the east-of-California region prior to curtailing ***any*** industrial service rendered to the California distributors. Thus, although El Paso commenced full requirements service to the east-of-California region some 15 years before commencing service to California, two of the largest utilities

in the United States are here seriously suggesting that their private party agreements purchased an exemption from curtailment, thereby demoting the antecedent full requirements service to the east-of-California region to a curtailment status subservient to their own. No greater example could be found of the economic bludgeoning that the public interest provisions of Sections 4(b) and 5(a) were designed to prevent.

The short answer to the California petitioners' claim of preference is that Sections 4(b) and 5(a) prohibit preferential or discriminatory practices irrespective of whether the service involved is for residential, commercial, or industrial purposes. There is nothing within the plain terms of such Sections, the legislative history thereof, or this Court's holding in ***LP&L*** to suggest that the Commission's mandate "to protect consumers against exploitation" does not apply equally to all classes of service. See ***Granite City Steel Co.*** v. ***Federal Power Commission***, 320 F.2d 711 (1963).

In recognition, perhaps, that the sanctions against undue preference or discrimination apply equally to service rendered to industrial requirements, the California petitioners assert that, if discriminatory, their claimed contractual right of exemption is not unduly so. In support of such contention, the California distributors point to the provisions for a minimum annual bill and for a rate incentive in the rate schedule under which El Paso renders their service, and assert that such provisions are obligations not assumed by the east-of-California parties. Such "obligations", however, do not justify exemption from curtailment. The minimum annual bill is a provision commonly assumed by virtually all interstate pipelines' major customers in order to assure the financibility of major expansions of facilities. Since the financial feasibility of the enormous expansion of El Paso's system was based on the assumption that the two new customers would purchase 80% of such dramatically expanded annual throughput, it is hardly unreasonable that a condition for financing such

expansion would include the assumption of a minimum annual bill by such distributors. As for the rate incentive, such "obligation" has historically enabled the California distributors to purchase from El Paso at a lower unit price than that paid by distributors in Arizona. Hence, neither of such items can be seriously claimed as burdensome obligations, much less as justification for the extraordinary preference claimed.

In sum, the decision below properly upheld the Commission's determination that all customers served by El Paso had the expectation of firm service, and that the consequence of the failure of El Paso's supplies must be apportioned ratably to the end-use requirements served by all customers of El Paso. Since such decision is based on the plain terms of the Natural Gas Act and this Court's interpretation thereof, the decision below is clearly correct.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[3]Petitioners, Pacific Gas and Electric Company and San Diego Gas and Electric Company, raise subsidiary issues relating to (1) a claimed conflict between the decision below and the Fifth Circuit's decision in ***International Paper Company*** v. ***Federal Power Commission***, 476 F.2d 121 (1973), and (2) a claimed violation of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, ***et seq.*** In both instances, the Court below fully discussed and properly dismissed such arguments as make-weight.

First, there clearly exists no conflict between the decision below and the Fifth Circuit's decision in ***International Paper***, as is set forth in detail in the decision below (Appendix A to the petition of Pacific Gas and Electric Company, pp. 18-19). The Fifth Circuit expressly acknowledged the Commission's plenary authority to override contractually based curtailment provisions upon a showing that such

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provisions were discriminatory. What *International Paper* did contest was a matter falling outside of the Commission's curtailment jurisdiction; i.e., "whether or not an FPC curtailment order alone will serve to insulate a pipeline unable to meet contractual commitments from liability for this failure." 476 F.2d 121, 123. It was solely with respect to " '*damages* in the public interest', not '*curtailment* in the public interest' " that the Fifth Circuit held a finding of unequivocal public necessity to be a prerequisite for the abrogation of contractual provisions. 476 F.2d 121, 129, (emphasis in original).

Second, with respect to the claimed violation of NEPA, the decision below correctly found that the Commission's obligation to comply "to the fullest extent possible" with NEPA's procedural obligations, means compliance unless such compliance would give rise to a violation of the Commission's statutory obligations (Appendix A to the petition of Pacific Gas and Electric Company, pp. 47-48). In

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this instance, the Court below properly held that the Commission, in the very compressed time span between hearing and decision, had a clear statutory duty to take effective interim action to prevent gross discrimination among customers. Hence, such statutory conflict properly excused compliance with NEPA's procedural requirements until the issuance of the permanent plan. (See: ***Atlantic Gas Light Company*** v. ***FPC***, 476 F.2d 142 (5th Cir. 1973).

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1772

SOUTHERN CALIFORNIA GAS COMPANY,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Reply Brief for Southern California Gas Company Addressed to Argument First Raised in Briefs in Opposition.

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August 30, 1974.

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Supreme Court Rules.

Southern California Gas Company (SoCal), submits this brief in accordance with Supreme Court Rule 24, subparagraph 4, which states:

> "Reply briefs addressed to arguments first raised in the briefs in opposition may be filed, but distribution under paragraph 3 hereof will not be delayed pending the filing of such briefs." (U.S. Sup.Ct. Rule 24.4, 28 U.S.C.A.)

Question Presented.

Whether the issues raised by the interim curtailment orders issued by the Federal Power Commission (Commission) are now, or will shortly become, moot because of subsequent Commission action.

Statement.

On May 24, 1974, SoCal respectfully requested that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, styled *American Smelting and Refining Company v. Federal Power Commission*, 494 F.2d 925, entered on January 21, 1974, affirming in certain respects Opinion Nos. 634 and 634-A of the Commission, entitled "Opinion and Order Prescribing Interim Emergency Curtailment Plan", issued October 31, 1972, and "Opinion and Order Clarifying Opinion, Denying Motions for Stay, and Denying Rehearing", issued December 15, 1972. These orders are reported at 48 FPC 931 and 48 FPC .... (1972), respectively.

Opinion Nos. 634 and 634-A prescribed a curtailment plan for the El Paso Natural Gas Company (El Paso) system which, once having insured service to human-needs customers, ignored the historical contractual relationship between the pipeline company and its customers. As stated in SoCal's petition for writ of certiorari, the Commission had previously approved such contractual relationship between El Paso and its customers repeatedly through the continuous issuing of certificates of public convenience and necessity. It is the unlawful setting aside *for all time* of this historical contractual relationship by the Commission in the absence of substantial evidence in the record and the unlawful abrogation of such contracts in clear derogation of the due process guaranties of the Fifth Amendment to the Constitution of the United States and of the Natural Gas Act of 1938, 52 Stat. 821-833, as amended, 15 U.S.C. §§717-717w, that compelled SoCal to seek review before this Supreme Court.

Since the filing on May 24, 1974, by SoCal before this Supreme Court, the Commission issued its Opinion No. 697, on June 14, 1974, entitled "Opinion and Order Prescribing Permanent Curtailment Plan and Complying with Court Remand of Interim Plan", which is appended hereto as Appendix A.

In their brief in opposition (Mimeo p. 5) American Smelting and Refining Company, Compania Minera de Cananea, S.A. de C.V., Inspiration Consolidated Copper Company and Kennecott Copper Corporation (ASARCO, *et al.*) contend that by virtue of the prescribing of the permanent plan in Opinion No. 697, the issues now before this Supreme Court will become moot in the very near future.

A similar argument is advanced by Arizona Public Service Company, Southern Union Gas Company, Southwest Gas Corporation and Tucson Gas & Electric Company (APS, *et al.*) in their brief in opposition (Mimeo p. 10).

Because the briefs in opposition have raised for the first time the issue of whether the Commission's issuance of Opinion No. 697 will shortly cause the issues now before this Supreme Court to become moot in the very near future, SoCal is filing this reply brief.

ARGUMENT.

Neither the Issuance nor the Effectiveness of Opinion No. 697 Will Cause the Issues Before This Supreme Court to Become Moot.

While the issue of mootness, by virtue of subsequent Commission action in prescribing a permanent curtailment plan, has not previously been raised in this proceeding requesting the issuance of a writ of certiorari, this very issue was raised by the United States Court of Appeals for the District of Columbia Circuit during the oral arguments on September 20, 1973, before that Court. The Court of Appeals was specifically concerned with the provision of the Commission's Opinion No. 634 (R. 13368) which stated that the interim plan would be effective until October 31, 1973, or until a permanent curtailment provision was approved, whichever was earlier. The Court inquired of counsel whether the issues in this proceeding would become moot if it failed to act before the Commission issued its opinion on a permanent plan. Mr. K. R. Edsall, Counsel for SoCal responded [Tr. 20-21, Hoover Reporting Company, Washington, D.C.]:

> "Your Honors asked other counsel about whether or not this case is moot. I would like to address myself to that first if I may to say to your Honors that it is not insofar as the California petitioners are concerned.
>
> "QUESTION: We mean will it be moot on October 31st.
>
> "MR. EDSALL: No, your Honor, it will not be, I respectfully submit to you for this reason. In Opinion 634, the Federal Power Commission took our contracts with El Paso and put them in

the wastebasket. It failed to recognize any contractual rights between El Paso and the California customers in its decision. In effect, it rendered those contracts null and void.

"It was impossible for us to let that decision become final because had it become final, there would be no redress for us again to argue that point. Therefore, in order to preserve our contention and our claim that our contracts with El Paso are indeed valid and binding and are indeed a mandate upon the Commission under certain circumstances not covered by the case of *Louisiana Power & Light*, we had to come to this Court at this time, and we would like the Court to reverse the Commission, remand the case, direct the Commission to prescribe a curtailment plan for the interim period that should have been prescribed in accordance with what we hope this Court will tell the Commission."

The Court of Appeals in its decision in *American Smelting, supra*, upheld the Commission's action in setting aside the contracts by stating (494 F.2d at 934):

"Having found that then existing [based on the historical contractual agreements] curtailment procedures for El Paso's Southern Division were discriminatory, the Commission was authorized to promulgate substitute procedures. To the extent the illegal curtailment plan was reflected in customer service contracts, *such contracts were also superseded by the Commission's orders.*" (Emphasis added).

While SoCal vigorously opposes the Court's characterization of the historical contractual relationship be-

tween El Paso and its customers, it is clear that the Court disposed of the contractual issues before it and did not consider that such issues would become moot when the Commission took future action in promulgating a permanent curtailment plan. The Court recognized that, since the Commission had determined the historical contracts to be violative of the Natural Gas Act for the purposes of an interim plan, the Commission had in fact set aside the contracts for all time.

There can be little doubt that the Commission, as evidenced by its decision in Opinion No. 697, also considered the contractual issues to have been finally disposed of by Opinion Nos. 634 and 634-A. Thus, the issue which SoCal wishes this Supreme Court to determine constitutes a true "case and controversy" as that phrase has been interpreted by this Court.

The Commission in Opinion No. 697 set forth in a general fashion a curtailment plan for the El Paso system which is to ultimately supersede the interim plan promulgated in Opinion Nos. 634 and 634-A.

The most important aspect of Opinion No. 697, for the purposes of the pending petition for writ before this Supreme Court, is that the Commission therein did not even discuss the contractual issues for which SoCal is seeking review before this Court. Such issues were raised by SoCal in its numerous briefs both to the Administrative Law Judge as well as to the Commission during the proceedings held to determine the need for a permanent curtailment plan on El Paso's system.

The Commission in Opinion No. 697 (Mimeo p. 34) did, however, adopt the Administrative Law Judge's initial decision of June 5, 1973, which is ap-

pended as Appendix B, as part of its opinion to the extent it was not inconsistent. The Administrative Law Judge in his initial decision in addressing himself to the Commission's treatment of the historical contractual relationship and the historical method for curtailment thereunder stated (Mimeo p. 7):

> "It [the Commission in Opinion No. 634] found the current rules [then based on the historical contractual agreements] to be discriminatory and violative of Section 4(b) of the Natural Gas Act. The Presiding Judge would so find on the basis of the record even absent a Commission holding. However, that holding appears to foreclose further consideration of the question. If the currently effective plan is discriminatory and unlawful for a temporary period, one can hardly contend with any conviction that it can properly be retained permanently. It is as improper for the future as for the present, and for the same reasons."

The Commission by its issuance in Opinion No. 697, of a permanent curtailment plan changed in some aspects its interim plan but continued unchanged in any way its unlawful abrogation of the historical contracts upon which El Paso constructed its system and upon which SoCal has relied, now, to its severe detriment. Indeed, Opinion No. 697 continues the decision in Opinion Nos. 634 and 634-A in unlawfully setting aside SoCal's contractual rights, and such is clear from the Commission statement in such opinion that (Mimeo p. 4):

> "We had determined at the time of the Court's decision [in *American Smelting, supra*] that a

> permanent plan for El Paso *virtuallly identical to the interim plan* would best serve the public interest, and were preparing to issue a final order to that effect. However, we could not issue a permanent plan so closely approximating the interim plan without resolving those aspects of the interim plan which the Court had found to be inadequate." (Emphasis added).

Since the Court had upheld the Commission's position on the contractual issues, the Commission merely adopted the Administrative Law Judge's decision on such issues and continued to unlawfully set aside the historical contracts.

Supreme Court precedent dictates that the issues in this proceeding have not been rendered moot by the issuance and will not become moot upon the effectiveness of the Commission's actions in Opinion No. 697. A similar situation arose before this Court in *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1934). In *Panama* the Secretary of the Interior had duly promulgated regulations under an Executive Order of the President for the implementation of the National Industrial Recovery Act of 1933, 15 U.S.C. §§700, *et seq.* Plaintiff brought suit to restrain the defendants, who were federal officials, from enforcing certain aspects of the regulations on the basis, *inter alia,* of an unconstitutional delegation of legislative power to the President. Subsequent to the instituting of the suit by plaintiffs, the regulations were amended by the Secretary of the Interior. Thus, the question of whether the subsequent agency action in amending the earlier regulations, which were the subject of plaintiff's action, rendered plaintiff's case moot was clearly placed before this Court.

This Court in rejecting the arguments for mootness stated (293 U.S. at 413-414):

> "Regulations IV., V. and VII., issued by the Secretary of the Interior prior to these suits, have since been amended. But the amended regulations *continue substantially the earlier requirements,* and expend them. They present the same constitutional questions, and the cases as to these are not moot." (Citations omitted, emphasis added).

It is clear from the above analysis of the Commission's actions in issuing Opinion Nos. 634 and 634-A and in issuing Opinion No. 697, that the Commission in promulgating its subsequent permanent curtailment plan has merely slightly amended its actions taken in promulgating its interim plan, and the permanent plan continues almost in total the earlier requirements and therefore the contractual issues raised before this Court are not moot.

ASARCO, *et al.,* in their brief in opposition (Mimeo p. 6) rely upon *De Funis v. Odegaard,* .... U.S. ...., 40 L.Ed.2d 164 (1974) and *North Carolina v. Rice,* 404 U.S. 244 (1971). ASARCO's reliance upon such cases is misplaced. *De Funis* concerned alleged unlawfully discriminatory admission procedures by a state university law school. Plaintiff therein brought the action on his own behalf and not as a class action seeking an injunction commanding the law school grant him admittance. The trial court granted the request, but on appeal the Washington Supreme Court reversed the judgment. Plaintiff, however, had already been admitted to the law school. By the time the case was before this Supreme Court, plaintiff was registered for

his final quarter and counsel for respondents made clear that the law school would not seek to abrogate such registration. In view of the fact that all parties agreed that the plaintiff was entitled to complete his legal studies at the law school, this Court stated that a determination of the legal issues was no longer necessary to compel that result, and could not serve to prevent it. This Court then concluded that since plaintiff had been accorded his remedy and had been irrevocably admitted to the final term of the final year of law school (40 L.Ed.2d at 169):

> "The controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests.'" [Citation omitted].

Since SoCal clearly has not been granted anything akin to a remedy in this proceeding and since the unlawful setting aside of its contract continues unabated and causes volumes of gas to which SoCal is entitled to flow daily to the east-of-California customers of El Paso, the *De Funis* case has no applicability to this proceeding.

Of even less relevancy to this proceeding than *De Funis* is *North Carolina v. Rice, supra.* In *Rice,* the respondent was arrested for driving while intoxicated, tried in a county court, and sentenced to nine months imprisonment with sentence suspended upon payment of $100 fine and costs. On Appeal he was tried *de novo* in Superior Court, found guilty and sentenced to two years imprisonment. The Federal Court of Appeals on appeal from denial of federal *habeas corpus* held that the more drastic sentence on the second trial

was a denial of federal due process in that by discouragement it impinged upon the State-given appeal. The Federal Court of Appeals further held that although Rice had already been completely discharged by North Carolina such discharge did not moot the case on *habeas corpus* because injurious consequences from the conviction might still obtain. This Supreme Court determined that the issue of mootness had been improperly disposed of by the Federal Court of Appeals and, setting forth the proper guidelines upon which to determine the issue of mootness, remanded the case to the court below.

The contractual issues raised by SoCal in its petition for writ of certiorari filed herein are clearly not mooted by the issuance of the Commission's Opinion No. 697 and will not become moot by virtue of the effectiveness of such opinion. The Commission has unlawfully set aside El Paso's historical contractual relationships with its customers and it is continuing such unlawful action in Opinion No. 697.

Conclusion.

For the foregoing reasons, the issues raised by SoCal in its petition for a writ of certiorari are not moot and the writ should be granted.

Respectfully submitted,

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August 30, 1974,

APPENDIX A.

Opinion and Order Prescribing Permanent Curtailment Plan and Complying With Court Remand of Interim Plan.

United States of America, Federal Power Commission.

El Paso Natural Gas Company, Docket No. RP72-6. Opinion No. 697.

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United States of America, Federal Power Commission.

CURTAILMENT

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

El Paso Natural Gas Company. Docket No. RP72-6.

OPINION NO. 697

OPINION AND ORDER PRESCRIBING PERMANENT CURTAILMENT PLAN

(Issued June 14, 1974)

NASSIKAS, Chairman:

This proceeding is concerned with establishing a just and reasonable curtailment plan on the El Paso system. In reviewing the various decisions rendered by Presiding Administrative Law Judge Arthur Fribourg in this docket, principally the initial decision of June 5, 1973, we find that certain modifications are required as shall be hereinafter addressed.

Procedural Background

On July 6, 1971, El Paso Natural Gas Company (El Paso) tendered for filing proposed changes in its FPC Gas Tariff to provide new priorities of service on its Southern Division System in the event that shortage of gas supplies required the curtailment of gas deliveries to its customers.

By an order issued August 5, 1971, the Commission suspended the proposed tariff sheets until January 6, 1972, ordered a hearing on the matter and granted interventions. Hearings to determine the justness and reasonableness of the proposed curtailment plan commenced November 9, 1971, and continued intermittently until May 18, 1972. After the hearings on the permanent plan, but before briefing was completed, El Paso, on August 17, 1972, filed a motion requesting the Commission to issue an emergency order prescribing an interim curtailment plan for the period beginning November 1, 1972, until issuance of a final Commission order prescribing a permanent curtailment

plan for the period beginning November 1, 1972, until issuance of a final Commission order prescribing a permanent curtailment plan for El Paso.

In response to a motion filed on August 24, 1972, by Salt River Project Agricultural Improvement and Power District, the Commission, by an order issued September 1, 1972, authorized a limited reopening of the record for purposes of determining the need for an interim curtailment plan on El Paso's Southern Division System and the form such plan should take if found to be needed.

A hearing on the interim plan commenced September 12, 1972, and ended September 25, 1972. On October 2, 1972, the Commission granted El Paso's motion to omit the intermediate decision. On October 31, 1972, the Commission issued Opinion No. 634 prescribing an interim emergency curtailment plan for El Paso for the period November 1, 1972, through October 31, 1973, or until the date of a final Commission order, whichever came first. Opinion No. 634-A. "Opinion and Order Clarifying Opinion, Denying Motions for Stay, and Denying Rehearing", was issued on December 15, 1972.[1]

On August 18, 1972, the City of Willcox, Arizona, and Arizona Electric Cooperative (AEPCO) filed a motion for extraordinary relief requesting exemption from El Paso's curtailment plan on the ground that alternate fuel supplies were unavailable to AEPCO, thereby endangering the reliability of electric service to its customers. The motion was denied by the Commission in Opinion No. 634, but allowance was made for the

[1]On appeal, affirmed in part and reversed and remanded in part, *American Smelting and Refining Co., et al. v. F.P.C.*, ... F.2d ...., (D.C.Cir., January 21, 1974).

filing of a new petition at a later time if AEPCO could make a more persuasive showing. AEPCO filed an amended motion on November 30, 1972, followed by a hearing on January 30, 1973, and denial of the motion by Presiding Law Judge Fribourg in an initial decision issued March 19, 1973.

Meanwhile on December 15, 1972, the permanent curtailment plan was initially briefed to the Presiding Judge. Reply briefs were initially due to be filed on January 15, 1973, but were postponed after a motion by El Paso requesting that a conference of all the parties herein be held to discuss the impact on the instant proceeding of October No. 467, the Commission's policy statement issued on January 8, 1973, which set forth priorities of deliveries to be followed by jurisdictional pipelines during periods of curtailment. On February 6, 1973, the Presiding Judge ruled that Order No. 467 did not require a reopening of the record and that the briefing schedule should be resumed. The Presiding Judge did rule, however, that the impact of Order No. 467 was a relevant matter for consideration in the reply briefs and that a third brief limited solely to this issue was appropriate. Consequently, reply briefs were filed on March 16 and responses to issues raised by Order No. 467 were filed on March 30, 1973.

An initial decision on the permanent curtailment plan was rendered by Presiding Administrative Law Judge Fribourg on June 5, 1973. The record remained open pending resolution of two ancillary phases of the case, to wit, issues raised by the petition of the City of Mesa, Arizona, for extraordinary relief from the operation of the interim curtailment plan, and the issues raised by Arizona Public Service Company, *et al.*, as to the grouping of delivery point obligations for purposes of

the permanent curtailment plan. An initial decision on the petition for extraordinary relief by the City of Mesa, Arizona, was subsequently rendered on June 27, 1973, followed thereafter by an initial decision on the grouping of delivery points, on September 9, 1973.

By order of October 18, 1973, the Commission extended the operation of the interim curtailment plan pending further action of the Commission on the permanent curtailment plan. Applications for rehearing and reconsideration of the Commission's October 18, 1973 order extending operation of the interim plan were filed by Pacific Gas and Electric, Southern California Gas Company, San Diego Gas and Electric, the People of the State of California and the Public Utilities Commission of the State of California. An order granting rehearing for the purpose of reconsideration of the October 18, 1973 order was granted by Commission order of December 3, 1973.

By order of October 25, 1973, the Commission denied a joint petition for extraordinary relief filed by the Department of Water and Power of the City of Los Angeles and Southern California Edison. Applications for rehearing of the October 25, 1973 order filed by the petitioners and the State of California and the California Public Utilities Commission were denied by Commission order of December 20, 1973.

On January 21, 1974, the United States Court of Appeals for the District of Columbia Circuit in *American Smelting and Refining Company, et al. v. F.P.C.*, ...F.2d...., affirmed in part and reversed and remanded in part the interim curtailment plan for El Paso. The court permitted the interim plan to continue in effect for a reasonable period of time pending a decision

by the Commission regarding the matters remanded for further consideration. We had determined at the time of the Court's decision that a permanent plan for El Paso virtually identical to the interim plan would best serve the public interest, and were preparing to issue a final order to that effect. However, we could not issue a permanent plan so closely approximating the interim plan without resolving those aspects of the interim plane which the Court had found to be inadequate. We have therefore reconsidered the interim plan in light of the Court's remand and have made certain revisions to our permanent plan as a result thereof. We thus find it appropriate and expeditious to treat both phases of the proceeding in this opinion.

Priorities of Service

In Order No. 467-B in Docket No. R-469[2] the Commission expressed its preference for an order of nine curtailment priorities such that users who purchase gas under interruptible contracts are to be curtailed ahead of users who have contracted for firm service. However, certain factual conditions shown by this record to exist on the El Paso Southern Division System persuade us that the Commission's overriding policy of curtailment based on end-use would be contravened should the priority format of Order No. 467-B, and the "firm-interruptible" contract distinction embodied therein, be imposed on the El Paso system. In our judgment, the manner in which the regulatory policy of the State of California has influenced the development of contractual relationships on the El Paso Southern Division System requires this modification of our policies.

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[2]Order No. 467, Docket No. R-469, issued January 8, 1973, as amended by Order No. 467-A, January 15, 1973, as modified by Order No. 467-B, March 2, 1974.

Pursuant to regulations of the California Public Utilities Commission, all contracts of California industrial consumers whose daily requirements of natural gas exceed 200 Mcf are interruptible contracts. No such limitation on the capacity to contract for firm service exists with respect to the East-of-California (E-O-C) customers. Although the Presiding Judge failed to rule definitively on the nature of the E-O-C contracts, we find that with exception of certain sales for irrigation purposes, El Paso's E-O-C customers purchase under firm contracts.[3]

Adoption of the Order No. 467-B priorities for the El Paso Southern Division System would result in virtually all the E-O-C industrial customers with requirements in excess of 200 Mcf daily escaping curtailment until such time as California customers with similar requirements had been totally curtailed. By virtue of his firm contract, the E-O-C industrial customer would be entitled to a higher priority curtailment category despite the fact that his use for gas was the same as, or even inferior to, that of his California counterpart. For example, while California industrial consumers were being curtailed, the full contract requirements of the electric generating facilities of Arizona Public Service Company, Tucson Gas and Electric Company, El Paso Electric Company, and the Salt River Project, all of whom purchase under firm direct sales contracts, would continue to be served.

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[3]The E-O-C contracts give no indication that El Paso is not expressly obligated to deliver certain volumes, nor can the E-O-C contracts be construed as anticipating or permitting interruption with virtually no notice nor construed as requiring alternate fuel capability. Compare definition of "interruptible service", Order No. 493, Docket No. R-474, issued September 21, 1973 (slip op. at 10).

In this context, application of the Order No. 467-B priorities would serve to exalt contract entitlements over end-use considerations, a result at variance with the intent of the Commission in its decision to incorporate the "firm-interruptible" distinction in its order of curtailment priorities. As we stated in Opinion No. 643, *Arkansas Louisiana Gas Company*, Docket No. RP71-122, 49 FPC ..... issued January 8, 1973:

> "interruptible sales are for the most part, predicated on end-use considerations; those customers, be they direct sales or indirect sales, who require gas for human needs service or nonsubstitutable industrial service do not contract on an interruptible basis." (Slip op. at 17.)

The value of the "firm-interruptible" contract distinction as a curtailment standard is thus largely dependent upon the accuracy with which it reflects the intensity of a purchaser's need for gas. In California, however, an interruptible contract does not necessarily reflect this intensity of need but rather signifies that the purchaser has complied with the state utility regulations. Under these circumstances, the reliability of the "firm-interruptible" concept as an index of end-use is not easily demonstrated, particularly, as discussed, *supra*, in light of the disparity in treatment which would be afforded similar E-O-C and California customers if the concept were strictly applied.

A substantially similar conclusion was reached in the initial decision, as evidenced by the manner in which the Presiding Judge conditioned the actual operation of the priority categories set forth therein. Recognizing the inconsistency inherent in a priority format that would permit placement of Nevada Power in a

higher priority category than that afforded an electric generating facility in California,[4] the Presiding Judge ruled as follows:

> ". . . if a distributor has a firm contract with El Paso and sells on an interruptible contract for boiler fuel use, the second contract should be treated as firm for purposes of allocation of priorities." (Initial Decision, slip op. at 15.)

El Paso sells to only two California customers, Southern California Gas Company and Pacific Gas and Electric, both of whom are distributors buying under firm contracts. By looking only to the contract between El Paso and the distributor to establish priority classification, the initial decision thus renders all California boiler fuel contracts firm, thereby for all practical purposes eliminating the "firm-interruptible" contract distinction on the El Paso system. Although the Order No. 467-B priority format is retained in the initial decision, its presence serves only a cosmetic function.

While in agreement with the result reached by the Presiding Judge, we view the indirectness of his approach, which we perceive as an effort to preserve at least the *formal* observance of the Order No. 467-B priority format, as unnecessary. Docket No. R-469 policies allow for some flexibility of application:

> "Orders in Docket No. R-469 are not self-operative in pending cases. *Initial decisions, and Commission decisions, will be reached on the record made, applying orders in Docket R-469 policies except where deviation therefrom is required by the evidence.*" (Order No. 467-B, slip op. at 5.) (Emphasis supplied.)

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[4]Initial Decision, Docket No. RP72-6, issued June 5, 1973. (slip op. at 15.)

We believe modification of the Order No. 467-B priority categories are warranted by this record and shall therefore prescribe an order of priorities based solely on end-use without regard to the firm or interruptible nature of the service rendered. The priority format so prescribed will therefore be virtually identical to that of the interim curtailment plan for El Paso set forth in Opinion No. 634.[5]

Our departure here from the Order No. 467-B curtailment categories should not permit the inference that the Commission is abandoning its position that interruptible uses should be subject to curtailment ahead of all other uses. Rather, we are here recognizing that an unbending commitment to the "firm-interruptible" contract distinction on the El Paso system would substantially compromise our fundamental objective of curtailment based on end-use. Moreover, we are not unmindful that the interim plan for El Paso has functioned without a showing of grievous hardship upon any party, a fact which further reinforces our belief that the action taken herein is in the best interest of gas consumers on the El Paso system.

Priorities

In light of the foregoing, the following priority of service categories shall be used during periods of curtailed deliveries on El Paso's Southern Division System:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day).

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[5]Opinion No. 634, *El Paso Natural Gas Company*, Docket No. RP72-6, 48 FPC 931, issued October 31, 1972.

Priority 2. Large commercial requirements (50 Mcf or more on a peak day), industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day) boiler-fuel use where alternate fuel capabilities can meet such requirements.

The priorities listed above are found to be a just and reasonable classification of markets served directly and indirectly by El Paso. This classification and order of priorities are necessary to provide a uniform identification of end uses upon which to implement natural gas curtailment. Although many variations of classifications and priorities have been urged by the parties, we believe that those specified herein represent a workable, equitable solution to a fundamentally complex problem.

We find residential and small commercial use as the highest priority requirement for natural gas during periods of curtailed deliveries. Residential and small commercial consumers must occupy the top priority because of the magnitude of the problems associated with conversions to alternate fuels by these consumers and because interruption of such service involves very real safety risks which cannot be accepted. The safety

risks relate to the inherently dangerous nature of natural gas and logistical problems associated with daily curtailment of large numbers of small volume consumers. Each consumer would require manual turn-off and turn-on service which can be safely performed only by a trained technician. In this respect, the circumstance of loss of service to residential and small commercial consumers is not analogous to loss of residential and small commercial electric power service.

In both Order No. 467-B and in the interim plan for El Paso we found that residential and small commercial use of 50 Mcf or less on a peak day should serve as the demarcation line for Priority 1. The Presiding Law Judge determined that the record did not support a 50 Mcf cut-off point for the permanent plan, but found that a basis did exist for expanding Priority 1 to include small commercial requirements not exceeding 200 Mcf per day. In making this finding, he relied principally upon testimony of Southern Union witness Haseltine, who testified in pertinent part as follows:

> "Our own particular classification of customers, which incidentally includes more than the three categories envisaged by El Paso's filing, classifies some customers as 'industrial' who for all practical purposes will be such small users of gas that it is an extremely difficult problem logistically and a rather meaningless exercise to curtail them." (Tr. 7079)

Witness Haseltine further testified:

> "A suggested level of cut-off might be in the 200 Mcf per day range. I think anything below that level as a practical matter represents virtually a

> noncurtailable load and certainly should not be classified in a priority group that would require them to be curtailed with the initiation of the first stages of curtailment." (Tr. 7080)

On the basis of this testimony, for which cross-examination was waived, the Presiding Judge concluded, at least as to commercial loads, that a 200 Mcf peak day cut-off point would be appropriate.

In our view, the Haseltine testimony at most indicates (1) that certain industrial customers of Southern Union use small quantities of natural gas, and, (2) that in the context of the distribution system about which Mr. Haseltine is most qualified to testify, namely, Southern Union, it is his view that any load below 200 Mcf per day is, as a practical matter, noncurtailable.

Further, we note that the Administrative Law Judge apparently chose to disregard evidence that the use of a 50 Mcf cut-off point would shift to Priority 1 more than 99.7% of PG&E's total class of 145,001 commercial customers. (Tr. 8197) It appears from this evidence that, at least with respect to the PG&E system, the curtailment of commercial customers whose requirements exceed 50 Mcf on a peak day does not pose an unmanageable logistical problem.

In view of the foregoing, serious questions arise as to the propriety of imposing a 200 Mcf cut-off point for all Priority 1 customers on the El Paso system. As discussed, *supra*, we have announced in Order No. 467-B that our decisions in curtailment cases "will be reached on the record made, applying orders in Docket R-469 policies except where deviation therefrom is required by the evidence." (Order No. 467-B, slip op. at 5.) We are unable to find from the evidence in this

record that deviation from the 50 Mcf cut-off point for Priority 1 customers as established in Order No. 467-B and implemented in the interim plan for El Paso is required for the permanent curtailment plan. Accordingly, the 200 Mcf cut-off point for Priority 1 customers, as found by the Presiding Judge, is reversed.

Priority 2 should be maintained as originally established in the interim plan with the exception that requirements for pipeline customers' storage injections should be added thereto. Commercial requirements of over 50 Mcf per day, and industrial requirements for plant protection, feedstock and process needs are all found to be relatively high priority uses of natural gas for which substitute fuels are technologically infeasible as in the situation of process needs, or where curtailment would unduly jeopardize human health or property as in the case of plant protection, or where the natural gas is used as a feedstock for its chemical properties rather than as a fuel. Large commercial requirements are found to be relatively high priority uses on the basis that the applications are usually for space heating, are much smaller volume on the average than industrial consumers, and as such represent higher costs of conversion per unit of natural gas displaced. Furthermore, complete curtailment of commercial consumers, many of which provide essential public services, can result in comparatively severe human health and property damage hardship circumstances when alternate fuel facilities are not provided or alternate fuels are not available. For these reasons, requirements for large commercial uses should be equated with the highest industrial priorities during periods of natural gas curtailment.

Natural gas used for injection into storage should also be accorded a relatively high priority as the primary purpose of storage is the protection of service to residential and other temperature-sensitive consumers during the winter heating season. Several parties urged that market requirements should be adjusted to reflect operation of storage, including volumes delivered from storage. We find that the volumes injected into storage should be treated in the same manner as any other end use of natural gas includable within Priority 2. However, the injection volumes should reflect a netting of storage withdrawals for any particular period in order to determine the appropriate volume includable within Priority 2 as storage injection requirements. This is necessary since storage serves as a source of consumption during injection, and as a source of supply with respect to volumes withdrawn. Injections should be computed on a net basis, that is, withdrawals should be subtracted out, to avoid confusing the two realistically large injection volumes which we find would be inconsistent with the purpose of providing a high priority for these uses.

The record shows that substantial evidence was introduced regarding the treatment of withdrawals from storage in computing curtailment which related both to the interim plan and the permanent plan. As we indicated in Opinion No. 634, with respect to the establishment of the interim plan, the storage withdrawal adjustment proposed by Staff added additional complications and was therefore eliminated. In this respect, there was criticism of the Staff formula because of indications that certain customers of El Paso with storage facilities (1) would not sustain any curtailment, (2) could receive deliveries in excess of their con-

tract demand, and (3) could totally indemnify themselves from curtailment by expanding storage withdrawal capabilities. As we found this criticism to be unresolvable by reference to the record made in the interim proceeding, we chose to eliminate that provision. Further, inasmuch as the interim plan was to be effective only for the winter period 1972-73, and inasmuch as the summer storage injection season had passed at the time of the issuance of the interim plan in October 1972, we anticipated that the storage injection issue could be timely addressed in the proceedings on the permanent plan.

In our subsequent examination of this issue in the permanent plan, we have found that the record contains widely divergent views. The Presiding Law Judge concluded that injections and withdrawals should be ignored. Certain parties with large storage facilities argue that withdrawals should not be used in any manner which would result in additional curtailment. Others allege that withdrawals are used as part of winter period supplies, and cannot be physically segregated from natural gas supplied by other means, therefore making the contention that winter storage withdrawals should be used to determine the proper share of El Paso's deliveries to its customer's markets. We agree with the view that storage withdrawals cannot be physically separated from other gas supplies and therefore contribute proportionately to all sales made from a system at the time that it is receiving withdrawal volumes.

It then follows that net storage withdrawals contribute on a proportionate basis to all *end-uses* being served contemporaneously by a given system. We thus conclude that net storage withdrawals should be treated

as a customer's independent source of supply in computing El Paso's share of such customer's requirements for a particular period. We further find that the record in this proceeding does not support the contention that treatment of storage withdrawals as a source of supply will discourage future development of gas storage facilities.

Priority 3 shall be the catch-all category for unspecified industrial requirements and as such represents a large group of generally smaller volume industrial uses of all types. On a unit of gas displacement basis, conversion to other fuels for these uses is more costly than in the case of larger volume uses. Gradation of the uses in this priority category by volume is not practicable in view of the number and variety of industrial applications represented.

Our assignment of boiler fuel usage to the lowest priority categories in the interim plan was remanded by the United States Court of Appeals for the District of Columbia Circuit in its January 21, 1974 decision in *American Smelting and Refining Company, et al. v. F.P.C.*, ... F.2d ....., for lack of specific supportive findings and reasoning. It is therefore necessary to state here that our decision in Opinion Nos. 634 and 634-A to subordinate boiler fuel to the lowest curtailment priorities was based on the same findings and reasoning which, as set forth hereinafter, compel a like subordination of boiler fuel in the permanent plan.

For purposes of both the interim and permanent plans, the evidence indicated that alternate fuels could be more easily substituted for natural gas in boiler fuel applications than in other applications. Secondly, the evidence demonstrated that the increase in air pollution

resulting from the use of alternate fuels could be more efficiently and economically controlled through the deployment of pollution abatement equipment by boiler fuel users because of the large size of individual installations. Third, by curtailing large volume boiler fuel users ahead of other industrial users the evidence showed that gas displacement could be maximized with a minimum of economic disruption and dislocation.

In establishing priorities as between boiler fuel users, we find, consistent with the above, that largest users should be curtailed first. The volumetric cut-off points specified in Priorities 4 and 5 represent a modification of a four-category ranking of boilers based on size suggested by Johns-Mansville witness Markus (Tr. 8298-8299). However, in the interest of orderly administration of both plans, we found it unnecessary to assign additional categories for boiler fuel use below 1500 Mcf per day or above 15,000 Mcf per day. We recognize that any number of gradations related to size may have been possible, however, in our judgment, the cut-off points established in Priorities 4 and 5 will result in the very largest boilers being curtailed first, with, correspondingly, the maximum initial displacement of natural gas.

The interim curtailment plan contained language in priorities 4 and 5 which defined requirements for boiler fuel use, "where existing alternate fuel capability is present." We stated in Opinion No. 634, "In so doing we are not requiring the installation of dual fuel capacity during the interim period. We do recognize that over the long term, the interim plan we have adopted may operate as a disincentive to the installation of alternate fuel capacities." (Mimeo page 6)

We find that circumstances regarding conversion to alternative fuels under which the interim plan was devised are no longer applicable.

Our intent as expressed in the interim plan to confine curtailment to situations where alternate fuel capability already existed is not viable long-term policy in light of El Paso's shortfall and the current nationwide natural gas shortage. We find that the public interest requires that every effort be made to convert equipment so that alternate fuels may be used where feasible.

We, therefore, provide that priorities 4 and 5 contain the terms, "where alternate fuel capabilities can meet such requirements."

Administration of Plan

The initial decision did not provide for excess gas takes. We find that the public interest requires unauthorized overrun penalties to insure compliance with the curtailment priorities established herein. For purposes of determining penalties an unauthorized overrun shall be those volumes taken by a customer which exceed the volumes available to it from El Paso by operation of this curtailment plan.

However, excess volumes which are taken to maintain the integrity of a customer's requirements in Priority 1 and Priority 2 shall not be deemed unauthorized overrun volumes for purposes of assessing penalties. In order to qualify for this exemption from penalty, a customer must be able to demonstrate that with the exception of deliveries made in satisfaction of Priority 1 and Priority 2 requirements, no deliveries were made in any other category during the period in which the ex-

cess volumes were taken. The exemption from penalty for Priority 1 and 2 uses is not to be construed as providing opportunity for El Paso's customers to abuse the exemption by permitting growth in these Priorities which would have the effect of increasing deliveries to those customers beyond the monthly base volumes established by this curtailment plan.

The record demonstrates that the levels of overrun penalties proposed by El Paso in the proceedings[6] are appropriate in light of the supply situation and the price of alternate fuels reflected therein. In the event that these overrun charge levels are found to be too low in the future, El Paso has adequate remedies under Section 4 of the Natural Gas Act. We shall require El Paso to file tariff sheets consistent with our findings hereinabove on penalties.

As indicated in Opinion No. 634-A, we prevented El Paso from implementing penalties during the interim program. We hesitated to permit El Paso to do so on the basis of the uncertainties surrounding the proposal regarding El Paso's actual needs for instituting penalties. The Commission felt then as it does now, that it has the authority to order a jurisdictional pipeline to in-

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[6]Original Sheet No. 67-E, FPC Gas Tariff, Original Vol. No. 1, Section 20.4

(a) For that part of the unauthorized overrun volume up to 3% of Buyer's entitlement for such day, an amount equal to that due under the applicable rate schedule.

(b) For that part of the unauthorized overrun volume which is in excess of 4% of Buyer's entitlement for such day, up to 5% of Buyer's entitlement for such day, an amount of $2.50 per Mcf.

(c) For that part of the unauthorized overrun volume which is in excess of 5% of Buyer's entitlement for such day, an amount of $5.00 per Mcf.

stall facilities when needed to physically limit deliveries to customers who violate curtailment orders.[7]

However, at the time the question was presented on the interim plan, neither El Paso nor its customers had any experience in natural gas curtailment. In fact, the E-O-C customers had no experience whatever in limiting their takes from El Paso. The impact of the penalty provision could not, in our judgment, be assessed at that time.

The initial decision provided for customers to furnish El Paso with end-use data every 30 days (p. 30). We agree with those parties who request an extension to 60 days in which they are required to furnish such data to El Paso.

The initial decision does not provide an adjustment on behalf of the partial requirements customers which would offset reduced deliveries to such customers from their other supply sources, although it has been urged on exceptions that the Administrative Law Judge erred in failing to provide such an adjustment. In Opinion 647, *United Gas Pipe Line Company*, Docket Nos. RP71-29, RP71-120, ... FPC ...., issued January 12, 1973, we said:

> "In approving this curtailment plan for United as it affects partial requirements customers, we shall allocate the impact of curtailment equally, insofar as may be possible, upon full and partial requirements customers treating both in the same manner." (Slip op. at 14).

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[7]See *Order Authorizing and Directing Interim Enforcement of Curtailment Program Pending Final Determination of Issues*, issued July 2, 1971, in *United Gas Pipe Line Company*, Docket Nos. RP71-29, and RP71-120.

We did indicate in that opinion, however, that modification of our treatment of partial requirements customers might be necessary to protect small volume residential service in the event of extraordinarily severe shortages requiring curtailment in the highest priority categories. (Opinion No. 647, Slip op. at 14). In reviewing the record in the instant proceeding, we find no indication that the reduced supplies available to the California partial requirements customers from sources other than El Paso, in combination with a curtailment of entitlements from El Paso prorated equally throughout the Southern Division syystem, will result in a shortage of such severity as to warrant special treatment for the partial requirements customers.

The record shows that deliveries to California by Transwestern Pipeline Company and Pacific Gas Transmission Company, its other interstate pipeline suppliers, were not curtailed at the time the record was compiled in this proceeding[8] (Ex. 53; Ex. 105). The evidence also indicates that California source gas supplies equaled approximately 8% of the total requirements of the Southern California companies in 1971, with the remaining 92% being supplied by interstate pipelines including El Paso (Ex. 105).

The witness for the Pacific Lighting Utilities serving Southern California testified that the level of service to firm consumers, including industrials, has been 100% for all years 1967 through 1972, but that deliveries to interruptible consumers have been declining since 1970. He further stated that there has been a substantial decline in the level of service for interruptible

[8]Since then Transwestern's deliveries have been curtailed slightly, but PGT has been able to maintain its full deliveries without curtailment.

consumers which will continue even with delivery of the full El Paso contract quantity (Tr. 7243).

Since interstate deliveries from all sources have not been curtailed during these years, this decline in service can be attributed to two factors only. One, that the California source supplies are declining, which is a fact of record, and (2) that the gross industrial market for natural gas in Southern California has been growing, which is also a fact of record (Ex. 105). Solutions to both of these causal factors are clearly outside the scope of the Commission's jurisdiction.

Given the current natural gas supply-demand imbalance in Southern California, the question then arises as to whether ratable curtailment by El Paso of industrial requirements within the same end-use priority on a systemwide basis is proper, or whether Southern California should be granted preferential treatment in light of its current imbalance. We find the evidence necessary to support a preference lacking.

One significant and highly variable factor controls the ability of industrial consumers exposed to natural gas curtailment to continue their operations, to wit, their ability to use and secure alternate fuels. There is no evidence in this record that industrial consumers in California are in a worse position with respect to their ability to use or to secure alternate fuels than consumers located E-O-C. In the absence of a positive showing regarding relative deficiencies in alternate fuel availability, we find that curtailment should be implemented to all customers without undue preference or discrimination.

We reject a policy, without compelling evidence to the contrary, which would effectuate greater curtail-

ment to E-O-C consumers in order to provide increased deliveries to the California markets because of either declining local supplies or growth in new industrial demands. Therefore, in our view, the decision of the Administrative Law Judge to treat full and partial requirements customers in the same manner was correct and is consistent with both our holding in the *United* case, *supra,* and the evidence herein. We therefore affirm the initial decision which provides for *pro rata* curtailment in each end-use category in proportion to the percentage of total gas supply from El Paso. Further, we do not believe that new supplemental gas supplies should receive any special recognition under the partial requirements formula, i.e. they should not be eliminated in determining a customer's entitlements during curtailment. However, with respect to the latter, any customer may file for reconsideration of the partial requirements formula when and if an incremental supply becomes available. As staff properly noted (Exceptions at 29-30), requirements should be equated to historical usage, and the total use from all sources in a given priority during the base period, including storage withdrawals, should form the coefficient to determine partial requirement customers' allocations.

The Administrative Law Judge (Initial Decision at 30-31) established a monthly base period to which periodic revisions would be made so as to encourage sales to higher priorities, and used historical deliveries for the 12 months ending June 30, 1973. This finding is essentially a policy decision which is unsupported by the record. In our view, monthly base volumes should closely approximate historical usage, and thus should be based upon the 12 months ending October 31, 1972 (the period immediately preceding the interim

emergency curtailment plan in Opinion No. 634).[9] We do, however, stand ready to consider revision to these base volumes at a later date and in a future proceeding upon a determination by us that such revision would be in the public interest.

Although we disagree with the "moving base period" approach adopted by the Presiding Law Judge, we do concur with his finding that annual volumetric limitations should be based on historical use rather than contract limitations. In this respect, the Presiding Law Judge observed, and we agree, that:

> On this record, the calculation of deliveries to users in a priority that is to suffer partial curtailment should be based on historical use rather than on contract limitations. As to California, one basis is substantially the same as the other because takes have been substantially at maximum contract levels. The E-O-C customers, meaning both the distributors and direct-sale customers, have had their requirements served 100%, but the contracts have not regularly been changed as the requirements changed. To base curtailment on contract limitations would therefore produce unrealistic and inconsistent results. To base curtailments on actual use makes unnecessary many petitions for extraordinary relief which would otherwise be filed.

This view of the record formed the basis of our decision in Opinion No. 634-A to impose annual limitations, based on actual takes, on the entitlements of the full requirements customers while basing the entitlements of partial requirements customers on contract en-

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[9]Compare Opinion No. 647 at para. 26.

titlements. However, as we failed to set forth in detail our reasoning therefor, it appeared to the reviewing court that our action may have been discriminatory.[10] However, as noted by the Presiding Law Judge, *supra,* the treatment of these two groups with respect to derivation of base volumes is identical, since the contract entitlements for the partial requirements customers coincided with their historical takes.

El Paso should continue to grant emergency relief by special exemption from curtailment in order to protect electric reliability and to respond to emergency situations (including environmental emergencies) during periods of curtailment where supplemental deliveries are required to forestall irreparable injury to life or property. The observations of the Presiding Judge at page 33 of his decision regarding the propriety of this delegation are herein reversed.[11]

Environmental Issues

In our order issued August 22, 1972, we denied a motion by Air Pollution Control District of the County of Los Angeles requesting termination of the instant proceeding and preparation and circulation by Commission staff of a detailed environmental impact statement.[12] In denying the motion, however, we nevertheless authorized the presentation of environmental evidence by any party so desiring and required that the

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[10]See *American Smelting and Refining Company, et al. v. F.P.C.,* .... F.2d. ...., D. C. Cir., January 21, 1974, (Slip. Op. at 43-45).

[11]*Cf.* Order No. 467-A, Amendment to Statement of Policy issued January 15, 1973, in Docket No. R-469.

[12]Order Denying Motion to Terminate Proceeding and to Require Staff to Prepare and Circulate Environmental Impact Statement, Docket No. RP72-6, August 22, 1972, 48 FPC 371.

process of analysis of environmental issues be embodied in the initial decision. Evidence was received on existing ambient air quality, federal, state and local air pollution regulations, meteorological conditions and possible economic consequences of gas reduction in each of the areas on El Paso's system that would be affected by curtailment.

In his review of the environmental evidence, the Presiding Judge concurred with staff's contention that on the basis of the factual record herein "any attempt to quantify the environmental impact on the El Paso service area would be abortive."[13] It is noted, however, that the concurrence of the Presiding Judge was given with no small measure of reluctance, for it is apparent from the initial decision that he does not share the Commission's view of the relationship of the National Environmental Policy Act (NEPA)[14] to curtailment proceedings. The Presiding Judge indicates that in his view a more complete record could have been developed with respect to environmental issues had we granted the motion of the Los Angeles County Air Pollution Control District and had we not reversed his order of January 27, 1972, directing staff to present an environmental impact case. He makes reference to studies conducted by certain FPC personnel, suggesting that similar studies might have been "of interest" in the instant proceeding.

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[13]Initial Decision, Docket No. RP72-6, June 5, 1973 (Slip op. at 8).

[14]National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

However, irrespective of the degree to which the record might have been illumined by a staff presentation on the issue of environmental impact, the other parties herein, representing a broad range of interests and viewpoints, were afforded the opportunity to present environmental impact evidence. The environmental record resulting from their efforts, as begrudgingly acknowledged by the Presiding Judge, "gives no reason to suppose that environmental considerations in the area served by El Paso gas, viewed from an overall standpoint, can be so quantified as to produce usable results."

The Presiding Judge therefore accepted staff's conclusions as to environment in every particular, as does this Commission. He expresses the view, however, that the record did not permit him to rule otherwise in light of the absence of any evidence from an "expert capable of viewing the entire El Paso situation as a witness devoted to the broadest public interest." We cannot accept this conclusion for two reasons. First, the Commission, in terms of both expertise and devotion to the public interest, is qualified to provide the perspective which the Presiding Judge feels is lacking in this record. Second, the Commission's position on the environmental impact issue was set out in detail in our order of August 22, 1972, and is a part of the evidentiary record herein.[15]

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[15] *Cf.* Order No. 415-C, issued December 18, 1972, in Docket No. R-398.

The Presiding Judge also implies that a full record may not have been developed herein as a result of the absence of an environmental statement by the staff. As previously stated, our Order of August 22, 1972, in this docket, sets forth the reasons which, in our judgment, preclude the presentation of a staff environmental impact statement in curtailment cases. We there determined:

> In proceedings involving the justness and reasonableness of proposed curtailment plans, the pipeline company cannot supply an analysis of the potential impact its plan will have on the quality of the human environment. Nor can this Commission.[16]

Our determination was reached through the exercise of "the knowledge and experience of this Commission gained through years of intimate association with the transmission and distribution functions of the gas industry."[17] The expertise so gained, when brought to bear on the question of the environmental impact of curtailment, required the conclusion that:

> The environmental impact of the implementation of a curtailment plan depends upon such variables as the degree of curtailment, the length of curtailment, atmospheric conditions during the time of curtailment, the locality where curtailment is implemented, and the end uses of the gas flowing through the pipeline system. Each of these variables can change without any dependence one upon the other, none can be known and measured in advance, and the environmental effects of all possible

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[16] 48 FPC at 373.

[17] *Ibid.*

> combinations of the variables would be mathematically impossible to compute, much less identify and measure.[18]

A review of the record in this proceeding provides us with no basis for reaching a different conclusion. Nevertheless, the Presiding Judge also invited the attention of the Commission to language in the recent court ruling in *Alabama Gas Corp. v. F.P.C.*, 476 F. 2d 142, No. 72-1475, 5th Cir. February 7, 1973, as support for the belief of the Presiding Judge that the preparation of a staff environmental impact statement in accordance with NEPA's Section 102(2)(C) procedural requirements was obligatory in this proceeding.

As our order of August 22, 1972, thoroughly addressed the issue of the inapplicability of Section 102 (2)(C) procedures in curtailment cases, we shall herein incorporate by reference and *in toto* the views expressed in that order.[19]

The language to which the Presiding Judge refers in the *Alabama Gas Corporation* decision is as follows:

> The mandate of the NEPA on federal agencies is that they comply with the procedural duties imposed by the Act to the fullest extent possible. See *Calvert Cliffs Co-ord Com. v. United States Atomic Energy Com'n.*, D.C. Cir., 1971, 449 F.2d 1109, 1114-15. As there noted, the legislative history of the NEPA interprets 'to the fullest extent possible' to mean compliance unless compliance would give rise to a violation of statutory obligations.

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[18] *Ibid.*

[19] *Cf. Arizona Public Service Co. v. F.P.C.*, 483 F.2d., 1275, 1282, (D.C. Cir. 1973).

We stated in the August 22, 1972 order that our review of court decisions did not lead us to the conclusion that the courts expect agencies to exalt form over substance in applying the mandates of NEPA.[20] We likewise do not believe that the legislative branch intended to require compliance in cases where, as here, the only result of compliance would be the preparation of an impact statement devoid of meaningful content.

We do not arrive at this judgment, however, in an attempt to shirk the responsibilities imposed on this Commission by NEPA. See *Scientist's Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, (D.C. Cir., 1973). It derives from our knowledge that the degree of speculation necessitated by such a prediction of future impact would, for the reasons expressed in our order of August 22, 1972, far exceed the standard of "reasonable forecasting and speculation" found in the *Scientist's Institute for Public Information* decision, *supra*, to be implicit in NEPA. In the *Scientist's Institute for Public Information* case, the court cited the "rule of reason" to be followed in determining whether an agency action has met NEPA requirements:

> 'The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible * * *.' (Footnotes omitted.)[21]

The Commission has determined in its order of August 22, 1972, that compliance with NEPA Section 102(2)(C) procedural requirements in curtailment cases is "not meaningfully possible", a determination further corroborated by the evidence in this proceeding.

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[20]48 FPC at 376.

[21]481 F.2d 1079, 1092.

Initial Decision on Application of City of Willcox and Arizona Electric Cooperative for Extraordinary Relief

The City of Willcox, Arizona and Arizona Electric Cooperative (AEPCO) contend that two issues are raised by their joint amended motion for extraordinary relief:

(1) Whether AEPCO's entire industrial load should be reclassified to a higher priority than provided under the interim curtailment plan; or, in the alternative,

(2) Whether AEPCO should be exempted from curtailment during the interim period.

The Presiding Judge correctly ruled that the issue of reclassification is directed to the merits of the curtailment plan adopted in Opinions No. 634 and 634-A, and therefore goes beyond the scope of the proceeding on the application for extraordinary relief authorized by our order issued in this docket on January 11, 1973. The hearing was ordered for the limited purpose of determining the capability of AEPCO to operate reliably and safely on fuel oil for sustained periods.

With respect to this limited issue, we find that the applicants failed to sustain the heavy burden of proving, on the basis of all factors, that an exception to the curtailment program is in the public interest.[22] The record indicates that AEPCO has been able to operate on fuel oil for extended periods. The record also supports the conclusion of the Presiding Judge that the risk of a boiler explosion occasioned by the use of fuel oil has been overstated. The attempt by the applicants

[22]Order issued January 9, 1973, *United Gas Pipe Line Company*, Docket Nos. RP71-29, RP71-120 (mimeo. at 4).

to demonstrate the imminence of the dangers attending the use of fuel oil under the AEPCO boiler is not aided by the admitted disinclination of the AEPCO management to install flame safety equipment. As stated by the Presiding Judge, "one can hardly believe that it [AEPCO] is deliberately risking its plant and that it now comes in asking to be protected from its own foolhardiness."[23]

The initial decision of the Presiding Judge issued March 19, 1973, denying the joint amended motion for extraordinary relief, is therefore affirmed in full.

Initial Decision on Application of City of Mesa for Extraordinary Relief

The City of Mesa, Arizona, has asked for extraordinary relief from the operation of the interim curtailment plan for El Paso as prescribed in Commission Opinions 634 and 634-A. Mesa's concern arises from the excess of its actual peak load over its contract quantity, because of the Commission's ruling in Opinion No. 634-A that the lesser of these two must limit the measurement of deliveries during times of curtailment.

In the initial decision on this issue, rendered June 27, 1973, the Presiding Judge denied Mesa's application as unnecessary on the grounds that Mesa's Priorities 1 and 2 customers are adequately protected by the provisions of El Paso's tariff which requires satisfaction of Priorities 1 and 2 requirements notwithstanding contract limitations. He further found that Mesa's Priority 3 customers cannot be curtailed, pursuant to

[23]Initial Decision on Application for Extraordinary Relief, Docket No. RP72-6, issued March 19, 1973 (mimeo. at 4).

Commission direction, until customers in subordinate priorities have been curtailed 100 percent. The Presiding Judge therefore stated:

> The first two priorities are protected as Mesa wishes, and the third to the same extent as is the case with any other customer. Equity requires no more. (Initial decision, June 27, 1973, slip op. at 4.)

We find no error in the ruling of the Presiding Judge on this issue. We note further that insofar as the permanent plan adopted here provides for calculation of curtailment requirements on the basis of historical use rather than on the basis of contract limitations, such petitions for extraordinary relief as here filed by Mesa should prove unnecessary under the permanent plan.

Decision of Administrative Law Judge on Grouping of Delivery Points

In Opinion No. 634-A, issued December 15, 1972, we ordered El Paso to eliminate from its interim curtailment plan the provision for grouping of individual delivery points. We said with respect thereto that such grouping ". . . could well result in increased industrial gas usage by those customers having a number of delivery points. Certainly it could result in discrimination against those customers, including California, who have only one delivery point." (Slip op. at 4).

In our order of February 7, 1973,[24] in response to Southern Union's application for rehearing, or in the alternative, petition for special relief, we reiterated our

[24]Order on Protests, Motions for Clarification, Applications for Rehearing of Interim Curtailment Plan.

view that grouping should be eliminated from the interim plan but invited the presentation of evidence as to the propriety of grouping in the permanent plan.[25] Subsequently, Southern Union Gas Company (Southern Union), Arizona Public Service Company (APS) and Southwest Gas Corporation (Southwest Gas) filed an application for a limited reopening of the record on the permanent curtailment to present evidence on the grouping issue, culminating in a hearing on June 14, 1973, and the issuance of an initial decision on September 19, 1973, by Administrative Law Judge Fribourg wherein the grouping of delivery points was approved for El Paso's permanent curtailment plan.

The United States Court of Appeals for the District of Columbia Circuit, on January 21, 1974, issued a decision on the interim plan for El Paso in *American Smelting and Refining, et al. v. F.P.C.*, ... F.2d ..... The court ruled, *inter alia*, that our elimination of the grouping of delivery points from the interim plan was not sustained by substantial evidence that such grouping would be discriminatory. The court therefore reversed our findings with respect to grouping in Opinion 634-A, and remanded the issue to us for further fact finding.

Our concern that the practice of grouping of delivery points may be discriminatory with respect to single delivery point customers remains undiminished, notwithstanding the initial decision of September 19, 1973, and the action of the court in *American Smelting and Refining, supra*. Although the Presiding Judge found in the September 19, 1973 initial decision in the reopened proceeding that grouping should be permitted

[25] *Id.*, Slip op. at 6.

on the El Paso system, we are unable to sustain his finding in view of the inconclusive nature of the evidence presented.

The record does not clearly reflect the volumes which would be available to multiple delivery point customers by the use of grouping as compared to the volumes available to such customers if grouping is not permitted. In our view, the question of possible discrimination cannot be adequately addressed absent this determination of the actual quantity of gas involved. The Presiding Judge endeavored to elicit this information in the course of the hearing. However, in apparent reliance on the following statement by counsel for Southern Union, little effort was thereafter devoted by the Presiding Judge to the clarification of the record on this point:

> "MR. HAGGERTY: Your Honor, as we began to prepare our evidence in this case we attempted to address that problem. What we ran up against was the problem that you have to develop such an elaborate set of assumptions in order to reach any finite volume, that we could not even begin to give a definitive number that we are talking about." (Tr. 8814)

We are reluctant to conclude that the distributors here involved are incapable, in terms of either operating expertise or technical resources, of determining the total volume of gas upon which this grouping controversy centers. Further, we find the record to be deficient with respect to the actual manner in which volumes would be shifted among customers if grouping is permitted. We cannot say that no discrimination will occur as between the market areas served in the absence of information regarding how and when volumes are shifted.

Additionally, it is asserted that grouping will aid the resolution of supplemental supply problems, inasmuch as a single central peak-shaving facility could be utilized which would preclude the need for a number of small peak-shaving facilities at individual service areas. However, the evidence does not reveal those specific service areas which might require peak-shaving facilities if grouping were prohibited, nor does the evidence show that the manner in which a central facility would operate would necessarily benefit customers in remote service areas.

In brief, we find the evidence on the reopened record does not permit an informed decision as to whether grouping should be permitted in El Paso's permanent curtailment plan. We therefore remand that issue to the Presiding Judge for additional evidence concerning those matters which we raise herein.

Insofar as the state of the record at this time does not permit us to find on the basis of substantial evidence that the grouping of delivery points on the El Paso system is discriminatory, we hereby set aside that portion of Opinion No. 634-A which prohibited the use of grouping for the interim curtailment plan. Grouping shall thus be permitted on the El Paso system commencing as of the date of this opinion until such time as the evidence developed in the remanded proceeding may otherwise require.

The Commission further finds:

(1) El Paso's interim curtailment plan in Docket No. RP72-6, as prescribed in Opinion Nos. 634 and 634-A, and as extended by our order of October 18, 1973, except as modified herein by the elimination from Opinion No. 634-A of the prohibition of group-

ing of delivery points, is just and reasonable for the period ending as of the effective date of this opinion.

(2) El Paso should revise its permanent plan to provide for the priorities of service in times of curtailment as set forth in this opinion and order and such a permanent plan is just and reasonable.

(3) The Initial Decisions of March 19, 1973, June 5, 1973, and June 27, 1973, are affirmed, to the extent consistent with this opinion and order, and all exceptions, not herein granted, should be denied.

(4) The Initial Decision of September 19, 1973, is reversed and remanded to the Presiding Administrative Law Judge to adduce additional evidence on those matters raised herein pertaining to the propriety of the grouping of delivery points in the permanent curtailment plan.

(5) In view of the decision herein, all applications for rehearing and reconsideration of the Commission's order of October 18, 1973 extending the interim curtailment plan for El Paso, as granted by our order of December 3, 1973, are rendered moot.

(6) The joint motion by the City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc., filed March 14, 1974, requesting modification of the interim curtailment plan is denied.

(7) The revised tariff sheets to be filed by El Paso should reflect the definitions contained in Order No. 493-A, issued October 29, 1973.

The Commission orders:

(A) El Paso shall continue such curtailments as are necessary in accordance with the interim curtailment plan prescribed in Opinion Nos. 634 and 634-A

and modified in finding paragraph (1) hereof, pending further Commission action on the tariff sheets to be filed in (B).

(B) El Paso shall file revised tariff sheets, within 30 days after this opinion and order, consistent with the terms and conditions prescribed herein.

(C) The Administrative Law Judge's Initial Decision of March 19, 1973, is adopted as part of this opinion, and exceptions, not granted, are denied.

(D) The Administrative Law Judge's Initial Decision of June 5, 1973, to the extent not inconsistent herewith is adopted as part of this opinion, and exceptions, not granted, are denied.

(E) The Administrative Law Judge's Initial Decision of June 27, 1973, is adopted as part of this opinion, and exceptions are denied.

(F) The Administrative Law Judge's Initial Decision of September 19, 1973, is reversed and remanded to the Presiding Administrative Law Judge to adduce additional evidence on those matters raised herein pertaining to the propriety of the grouping of delivery points in the permanent curtailment plan.

(G) All applications for rehearing and reconsideration of the Commission's order of October 18, 1973, extending the interim curtailment plan for El Paso, as granted by our order of December 3, 1973, are rendered moot by our decision herein.

(H) The joint motion by the City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc., filed March 14, 1974, requesting modification of the interim curtailment plan is denied.

(I) This opinion and order shall become effective within 60 days after its issuance, or, in the event applications for rehearing are filed, upon the date of a final order on rehearing in this proceeding, whichever is the later.

By the Commission. Commissioner Moody, dissenting, filed a separate statement appended hereto.

Commissioner Smith, dissenting in part, filed a separate statement appended hereto.

Kenneth F. Plumb,
Secretary

[Seal]

El Paso Natural Gas Company. Docket No. RP72-6. (Issued June 14, 1974).

MOODY, Commissioner, *dissenting:*

I.

Noncompliance with Section 102(2)(c) of NEPA[1] is premised upon the view that "preparation of an impact statement [would be] devoid of meaningful content." (Order, p. 21.) This is essentially the same position taken by the Commission in its August 22, 1972, order in this docket,[2] wherein we declined to order Staff preparation of an impact statement.

No matter how logical this position,[3] it has been rejected by the Courts—directly rejected in this case,[4] and inferentially rejected by the Fifth Circuit.[5] I take it that only where Section 102(2)(c) compliance gives rise to a violation of statutory duty is compliance excused;[6] such a situation is not here present. We

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[1]42 USC 4321, *et seq.*

[2]48 FPC at 376.

[3]At the time of issuance of the August 22, 1972, order, I shared the belief of my colleagues that application of a rule of reason permitted noncompliance with Section 102(2)(c) in curtailment cases; I believed then, and still believe, that any impact statement in a curtailment case will be filled with speculation and conjecture because of the multiple unpredictable variables involved.

[4]The August 22 order was before the Court in connection with the appeal of our order prescribing an interim plan for El Paso. See *American Smelting & Refining Co. v. F.P.C.*, No. 72-2204, CADC, slip opinion issued January 21, 1974. While the Court excused noncompliance with NEPA in formulating an interim plan, Part VI of the opinion (pp. 46-48) makes clear that the Court will require compliance before a permanent plan is prescribed, unless statutory impossibility is demonstrated.

[5]*Atlanta Gas Light Co. v. F.P.C.*, 476 F.2d 142 (CA5, 1973), at 150.

[6]*Calvert Cliffs Coordinating Committee v. A.E.C.*, 449 F.2d 1109 (CADC, 1971); *Atlanta Gas Light Co. v. F.P.C., supra; American Smelting & Refining Co. v. F.P.C., supra;* and

should, therefore, delay no longer the implementation of NEPA procedures, even though this will require a continuation of El Paso's interim plan[7] until the environmental impact of that plan, and alternates thereto, are studied.

II.

As indicated, I do not believe we can validly prescribe a permanent curtailment plan in the absence of Section 102(2)(c) environmental impact studies. The majority's rejection of this view, and their consequent adjudication of curtailment priorities and implementation, necessitates an expression of my disagreement concerning one aspect of the disposition of the case on its merits. I dissent to the determination that the distinction between firm and interruptible sales in the El Paso system should be ignored.

III.

When an agency such as ours is called upon to implement rationing by administrative fiat, we are confronted at the outset with the inescapable fact that there is not enough of this precious fuel to go around, and someone must be told that he must shoulder the burden of first interruption.

I consider it appropriate for us to approach this most difficult problem by considering the impact of our curtailment orders; if the result of our orders is to impose

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see *Scientists' Institute for Public Information, Inc. v. A.E.C., et al.*, 481 F.2d 1079 (CADC, 1973) holding that uncertainties in an agency's evaluation of environmental impact does not justify noncompliance.

[7]The interim plan should be evaluated, and modified where necessary, in accord with the Court's mandate in *American Smelting, supra*, and particularly the orders entered by the Court of Civil Appeals on May 22, 1974 and June 10, 1974. This should be the function of the present opinion, rather than attempting to prescribe a permanent plan at this time.

curtailment on some who have no means of using an alternate fuel, at a time when there are other customers on the pipeline system who can utilize alternate fuels, a decision to authorize the flow of gas to the fuel-sufficient customer is very difficult to defend.

I consider it appropriate for us to consider also the historic facts concerning gas usage on a given pipeline system; if one class of customers has historically paid a higher price in return for the apparent guarantee of preference in gas service, while other customers have paid a lower price in recognition of the pipeline's acknowledged right to interrupt that service, the *quid* has been paid and it is time for us to put the *pro quo* into the transaction.

In the evolvement of our curtailment policies, considerations such as these led us to say in Opinion 643, *Arkansas Louisiana Gas Company,* Docket No. RP71-122:

> ". . . [T]hose customers, be they direct sales or indirect sales, who require gas for human needs service or non-substitutable industrial service do not contract on an interruptible basis. Interruptible service, at the lower rates charged for such service, envisions interruption. And accordingly, interruptible customers can most reasonably be expected to have alternate fuel facilities already operational. We conclude, therefore, that curtailment should first fall on those who have not historically borne the full-fixed costs of providing gas service, particularly since these customers are best prepared to accept interruptions in service and clearly do not require uninterrupted service for protection of life or property." (49 FPC 53 at 66; Footnote omitted.)

Subsequent to the issuance of Opinion 643, we recognized the wisdom of granting firm gas service a preference over interruptible gas service in every curtailment proceeding that came before us. We acknowledged this to be our policy view when we issued Order 467-B in Docket No. R-469.

After reviewing this record, I am persuaded that the same policy considerations apply to the El Paso Southern Division curtailment, and I think we should accord a preference to firm service over interruptible service for this pipeline, not because we previously determined that such should be done, but because this record demands such treatment if a just and reasonable and nondiscriminatory program of curtailment is to be carried out.

IV.

This record reflects that interruptible service rendered in California has been rendered, historically, at a rate lower than that charged firm industrial customers. Using the year ended December 31, 1971, for comparison, it appears that interruptible loads were paying 32¢ to 34¢/Mcf while the B-1 rate customers were being charged from 35.66¢/Mcf to 37.97¢/Mcf. The B-1 customers are all located east of California, so it is obvious that the California interruptible market received its gas at a rate substantially lower than the quoted figures would indicate once the additional cost of transportation is taken into account.

The record further indicates that California interruptible customers whose requirements are in excess of 200 Mcf per day are required by state law to maintain alternate fuel facilities. I can find nothing in this record indicating that these interruptible customers cannot utilize alternate fuels.

Given these facts, I can find no acceptable reason for eliminating the distinction between firm and interruptible service.

V.

The majority concludes that the distinction between firm and interruptible service should not be recognized on the El Paso Southern Division because (1) recognition of the distinction would result in curtailment falling heavily on the California industrial market while gas used for the same purposes east of California would have a lighter curtailment burden (majority opinion, pp. 5 and 6) and (2) California interruptible customers became such because of state law and not because of a conscious decision to choose interruptible service (majority opinion, pp. 6-7).

I find neither reason persuasive, but before addressing the substance of the matter, it is necessary to worry for a moment about the language chosen by the majority in discussing this issue. The majority says:

> "Adoption of the Order No. 467-B priorities for the El Paso Southern Division System would result in virtually all the E-O-C industrial customers with requirements in excess of 200 Mcf daily escaping curtailment until such time as California customers with similar requirements had been totally curtailed. By virtue of his firm contract, the E-O-C industrial customer would be entitled to a higher priority curtailment category despite the fact that his use for gas was the same as, or even inferior to, that of his California counterpart. For example, while California industrial consumers were being curtailed, the full contract requirements of the electric generating facilities of Ari-

zona Public Service Company, Tucson Gas and Electric Company, El Paso Electric Company, and the Salt River Project, all of whom purchase under firm direct sales contracts, would continue to be served." (pp. 5-6.)

This language invites grave misunderstanding. We do not, and cannot, control the volume of gas that will be delivered to the California industrial customers. These customers are served by distributors which purchase gas from El Paso and the function of our curtailment plan is only that of determining the allocation of gas which the California distributors are to receive from El Paso. How that gas is then allocated within the State of California rests with the California distributors and the California Public Service Commission.

I consider it vital that there be no misunderstanding on this score. This Commission has not undertaken to dictate the end uses to which natural gas is put at the point of ultimate consumption. We have left this decision to the state regulatory commissions. Once we determine the allocation to be made by the pipeline to the distributor (which allocation we make in terms of end-use patterns), we have had our say; any state may choose to allocate the volumes which a distributor receives from an interstate pipeline on a different pattern of end-use priorities than the ones that we apply for allocation purposes. The state commissions must have this freedom, I believe, in order to be responsive to the multitude of local considerations which are beyond our knowledge and beyond our capacity to evaluate.

VI.

I turn to my reasons for disagreement with the substantive matters as stated in the majority opinion. The first, as noted above, is that the impact of curtailment on the California industrial market *vis-a-vis* the east of California industrial market should be lightened. This conclusion seems erroneous to me because the California industrial customers that raise concern with my colleagues are precisely within the category of gas users best equipped and best able to handle the initial burden of curtailment. These industrial customers do indeed have alternate fuel capacity; their alternate capacity is in place and in operation. They have access to alternate fuels.

The majority is led to depart from the firm/interruptible distinction because the regulatory policy of the State of California has been one which prohibits large industrial sales from being made on a firm basis if alternate fuels can be used. But this policy does not negate the incontestable fact that substantially all of the California interruptible service satisfies the very considerations that the Commission relied upon in concluding that interruptible requirements should be curtailed first. The fact that state policy may have had a hand in creating conditions which comport with federal policy surely provides no justification for declining to carry out federal policy. Indeed the very opposite would seem to be true. It was indeed the policies of the California Commission which have permitted the California distributors to purchase gas at a 100 percent load factor and thereby minimize the average cost per Mcf to all classes of customers in California, residential, commercial and industrial.

VII.

The majority also eliminates the distinction between firm and interruptible service on the El Paso Southern Division because of its conviction that the status of the California industrial contracts as interruptible reflects state policy and does not truly reflect "the intensity of a purchaser's need for gas." (Majority order, p. 6.) I disagree. The very fact that the California industrials have operated under interruptible contracts for a long period of time is indeed a measure of the intensity of their need. If we concern ourselves only with the facts of record here, it seems inescapable that the California interruptible industrial market does have alternate fuel capacity in place and operational. The firm customers of El Paso which are located to the east of California and which never envisioned the interruption of service because they had firm contracts are not so prepared for curtailment at this time. As Nevada Power Company puts it:

> "Interruptible end users on El Paso's system, such as SoCal Edison, have bought natural gas at lower prices and have alternate fuel facilities already operational. Firm end users, such as Nevada Power, have paid higher prices for the assurance of a firm gas supply and, consequently, were not expected to install—and had not in fact installed —equivalent alternate fuel capacities." (Nevada Power Company's Brief on Exceptions, p. 7.)

I cannot, in good conscience, ignore the realities of the present in order to reconstruct what might have been if California regulatory policy had been different.

/s/ Rush Moody, Jr.
Rush Moody, Jr., Commissioner

El Paso Natural Gas Company. Docket No. RP72-6. (Issued June 14, 1974).

SMITH, Commissioner, *dissenting in part:*

An environmental impact statement to accompany a "major federal action significantly affecting the quality of the human environment"[1] must be prepared "unless there is a clear conflict of *statutory* authority." *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission,* 449 F.2d 1109, 1115 (D.C. Circ., 1971). The Federal Power Commission has a "statutory duty to the public to take effective *interim* curtailment action in the exigencies presented by gas shortages," *Atlanta Gas Light Company v. Federal Power Commission,* 476 F.2d 142, 150 (5th Circ., 1973). Thus, where it is impossible to prepare the NEPA statement within the time necessary to implement the interim plan in the emergency situation, the statutory duty of the FPC and NEPA requirements are inconsistent and the former prevails. See *American Smelting and Refining Company v. Federal Power Commission,* No. 72-2204 (D.C. Circ., 1974). However, where there is ample time to prepare the impact statement prior to fulfilling the statutory obligations, by the implementation of a final curtailment plan, it is not impossible to prepare the impact statement, it is only *difficult* to make the judgments necessary to formulate environment analysis. "Considerations of administrative difficulty, delay or economic cost will not suffice to strip the

[1]NEPA §102(2)(c), 42 U.S.C. §4321.

section (NEPA 102) of its fundamental importance." *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, supra.

The court in *American Smelting and Refining Company v. Federal Power Commission*, No. 72-2204 (D.C. Circ., 1974) recognized that in a situation requiring "prompt" action, the impact statement is not required, but the court also clearly indicated an expectation that an impact statement would be prepared for consideration with the final curtailment plan in this case.

The failure to prepare an environmental impact statement to accompany the final El Paso curtailment plan will almost certainly result in the implementation of the plan being substantially delayed. "(M)eaningful consideration of environmental factors (must be given) at all stages of an agency decision making." *Scientists Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F2d 1079, 1091 (D.C. Circ., 1973); *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, supra at 1114. The reversal of the final curtailment plan because of absence of the environmental impact statement would render necessary a reconsideration of substantially all other issues relating to the curtailment plan. This would cause further unreasonable delay in the implementation of a fair, equitable, and final curtailment program. The attendant time, expense, and business uncertainty should be minimized.

Neither "expertise and devotion to the public interest" (Order, p. 18) nor "knowledge and experience . . . gained through years of intimate association with the transmission and distribution functions of the gas industry" (Order, p. 19) can substitute for compliance with a statutory requirement, particularly when a reviewing court has clearly signalled its attitude towards the matter.

I dissent to the failure of the majority to direct Staff to prepare a NEPA statement, and otherwise concur with the disposition of the case.

/s/ Don S. Smith

Don S. Smith, Commissioner

APPENDIX B.

Presiding Judge's Decision on Curtailment Plan.

United States of America, Federal Power Commission.

El Paso Natural Gas Company. Docket No. RP72-6. (June 5, 1973).

APPEARANCES

C. Frank Reifsnyder, G. Scott Cuming, Walter G. Henderson, Donald Snow Snow and *Donald J. Mac Iver, Jr.*, for El Paso Natural Gas Company

William R. Duff and *Henry E. Brown* for El Paso Electric Company; Magma Copper Company; Phelps Dodge Corporation; Salt River Project Agricultural Improvement and Power District

William J. Derrick for El Paso Electric Company

John F. Mills for Magma Copper Company

Leroy Michael, Jr., and *Richard H. Silverman* for Salt River Project

Earl H. Carroll for Phelps Dodge Corporation

John T. Ketcham, Charles E. McGee and *Robert G. Haggerty* for Southern Union Gas Company and Pioneer Natural Gas Company

James R. Wetherbee and *A. S. Grenier* for Southern Union Gas Company

Jerry Hopson for Pioneer Natural Gas Company

Israel Butler, Thomas D. Clarke, K. R. Edsall and *Norman J. Provost* for Southern California Gas Company

Robert W. Tollen, Sherman Chickering, C. Hayden Ames and *Donald J. Richardson* for San Diego Gas and Electric Company

David D. Mix, John D. Maharg and *John W. Whitsett* for Air Pollution Control District of the County of Los Angeles

Walter F. Wolf, Jr., for The Navajo Tribal Utility Authority

Rufus G. Thayer, Jr., Lawrence O. Garcia and *Mary Moran Pajalich* for The People of the State of California and The Public Utilities of the State of California

Mrs. Lilyan Goode Sibert and *Renn C. Fowler* for General Service Administration, Office of General Counsel

Frederick G. Von Huben for Community Public Service Company

William S. Martin, Jr., for The City of Lordsburg, New Mexico

Henry F. Lippitt, II, for The Nevada Industrial Customers

Reuben Goldberg, Leo J. Steffan, Jr., for Nevada Power Company

Darrell Clark, Charles H. McCrea and *Lawrence V. Robertson, Jr.*, for Southwest Gas Corporation

H. Robert Barnes, R. E. Woodbury, Robert J. Cahall and *William E. Marx* and *Alan Nedry* for Southern California Edison Company

John H. Engel for The Citizens Utilities Company

Arthur T. Devine, Roger Arnebergh and *Edward C. Farrell* for Department of Water & Power, City of Los Angeles

Richard M. Merriman, Peyton G. Bowman, III, and *Brian J. McManus* for City of Mesa, Arizona, and Arizona Public Service Company

Robert T. Hall, III and *N. H. Powell* for Arizona Public Service Company

J. LaMar Shelley and *Robert T. Hall, III* for The City of Mesa, Arizona

Thomas F. Brosnan, A. Y. Holesapple and *Lawrence V. Robertson, Jr.* for Tucson Gas and Electric Company

Jerome Ackerman and *James R. McCotter* for American Smelting and Refining Company, Compania Minera de Cananea, S. A., Inspiration Consolidated Copper Company, and Kennecott Copper Corporation

Timothy M. Kelleher, Daniel E. Gibson, Frederick T. Searls, Malcolm H. Furbush and *Katy Todrank* for Pacific Gas and Electric Company

William G. Riddoch, Thomas G. Johnson and *Dan A. Bruce* for Shell Oil Company

Heber P. Hardy for Public Service Commission of Nevada

Edward J. Grenier, Jr., George Mabry and *Richard P. Noland* for Johns-Manville Corporation and seven Nevada Industrial Customers of Southwest Gas Corporation

Douglas W. Fraser for New Mexico Public Service Commission

Edward J. Grenier, Jr., and *Richard P. Noland* for Johns-Manville Products Corporation

Kermitt L. Waters for the City of Las Vegas, Nevada

Richard P. Noland, Edward J. Grenier, Jr., Ross L. Malone and *William A. Vaughan* for General Motors Corporation

James N. Horwood for City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc.

Platt Davis, Jane Nix and *James M. Broadstone* for the Staff of the Federal Power Commission

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FRIBOURG, Presiding Administrative Law Judge: El Paso Natural Gas Co. (El Paso) on July 6, 1971, filed proposed new tariff sheets to provide new priorities on its Southern Division System in the event that shortage of gas supplies required it to curtail deliveries to its customers. It proposed to allocate the firm reliable capacity of the system[1] among its customers and to cut service according to the new priorities if service has to be cut.

I. *Statutory Background*

Under Sections 4 and 5 of the Natural Gas Act,[2] companies subject to it are prohibited from maintaining any unreasonable differences in service and are required to have just and reasonable rules and regulations. If the Commission, after hearing, finds a classification, rule, regulation or practice to be unjust, unreasonable, unduly discriminatory or preferential, it

> * * shall determine the just and reasonable * * classification, rule, regulation [or] practice to be thereafter observed and in force and shall fix the same by order * *

This statutory background is mentioned to show the nature and limits of the problem. It is necessary first to determine that the present rules are unjust, unreasonable, unduly discriminatory or preferential, and second to make an order that is not.

The large number of parties and briefs makes it impossible, within the compass of a decision of reasonable length, to answer in detail every suggestion made and every position taken, though each has been con-

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[1]All such references are to El Paso's Southern Division System, no other properties of El Paso being involved here.

[2]15 USC § 717c, 717d.

sidered, and those material to the order here made have been answered by acceptance or rejection, explicit or implied. The attempt here is to make a reasonable order. It does not follow that all other possible orders are unreasonable.

II. *The Present Rules*

El Paso itself states in its brief that "* * gross inequities would result if curtailment were instituted in accordance with the procedures prescribed in El Paso's existing tariff and gas sales agreements * *" and the record confirms this. If such curtailments were required, service to the California distributor customers for any purpose would be the last to be cut. Thus, elimination of commercial and even residential service east of California would precede any reduction of California's industrial boiler-fuel requirements.[3]

In Opinion No. 634, ... FPC ...., October 31, 1972, the Commission spoke of this very question in fixing emergency rules for the 1972-3 heating season. It said (slip op., p. 3):

> * * It is obvious that we would be negligent in our duties if we allowed human needs customers on any portion of the system to be cut off while industrial customers were still receiving gas on another portion of the system.

[3]The City of Willcox, Ariz., disagrees with El Paso's interpretation of its own tariff and points to tariff provisions which, it says, would cut service to California in times of shortage but leave El Paso liable in damages to its California customers for failure to deliver. Willcox's interpretation, if correct, would leave El Paso in an intolerable position and thus supports, rather than negates, the proposition that the tariff is unjust and unreasonable.

It found the current rules to be discriminatory and violative of Section 4(b) of the Natural Gas Act. The Presiding Judge would so find on the basis of the record even absent a Commission holding. However, that holding appears to foreclose further consideration of the question. If the currently effective plan is discriminatory and unlawful for a temporary period, one can hardly contend with any conviction that it can properly be retained permanently. It is as improper for the future as for the present, and for the same reasons.

The proposed revised tariff sheets, filed July 6, 1971, have not been placed in effect. Only the Commission's interim orders (Opinions Nos. 634 and 634-A) prevent the old rules from being effective now. As previously noted, the old rules are unjust and unreasonable. It could be contended, however, that it is the rules embodied in the proposed tariff sheets that must be found unjust and unreasonable before new ones can be fixed by order. If so, that finding is hereby made for the reasons stated below.

El Paso's plan would allocate existing capacity among its customers and would establish a curtailment system based on those allocations. The two California customers, which have been served as to part of their requirements on a contract demand basis, would be allocated capacity equal to their contract demands.

The East of California (EOC) customers have historically been served their full requirements on one-

part straight rates. They would be given allocations less than their historical usage. Consequently their curtailments would start from a lower base, measured in relation to past takes, than those of the California customers. In effect, they would be curtailed first by force of the allocations, not as a result of any differences in the use of the gas. That is arbitrary.

The plan would require El Paso's distibutor customers to execute new service agreements and its direct sale customers to execute new contracts, all reflecting the new entitlements and none limited to the duration of the shortage. These provisions would materially change El Paso's basic obligations and go far beyond what a curtailment plan may properly include. The staff and certain intervenors, *e.g.*, Nevada Power Co., correctly argue that the plan is a partial abandonment of service and as such violates Section 7(b) of the Natural Gas Act. Whether this is true or not, the Act gives a pipeline no authority to require modification of its contracts with its customers without their consent. Yet a portion of the cutbacks contemplated by the plan would be permanent cutbacks. That is, they would continue even if the shortage disappears, as El Paso's own witness admitted.

A curtailment proceeding is undertaken so as to decide how a natural-gas company should apportion an inadequate supply. Revision of contracts is rarely, if ever, necessary to such an apportionment or appropriate to such a proceeding. Allocation of capacity as El Paso proposes would distort the entitlements on

which curtailment should be based. For the foregoing reasons the plan is found to be unjust and unreasonable.

III. *A Just and Reasonable Plan*

A. *Statements of Policy*

The Commission has issued several statements of policy on curtailment of deliveries by jurisdictional pipelines. In Order No. 467[4] it stated its intention to set forth categories of use that would be generally applicable throughout the industry and could be utilized as to any pipeline for establishing priorities in periods of short supply. It has been argued that the Presiding Judge is bound by the Commission's statements of policy. It has also been argued that since the parties had no notice of Order No. 467 they cannot be bound by it until the record has been once again reopened to permit them to put in more evidence on the impact of the priorities set forth in the order. One litigant claims that aggrievement would occur if he must confine his arguments "to the evidence which the record already contains by pure chance."

The position that pure chance is responsible for the evidence gives too little credit to the efforts of counsel and witnesses. Counsel have worked with diligence and ability to create a record that will properly reflect the best interests of their clients. A decision based on the record is surely no worse for being consistent with Order No. 467, and the parties gain no rights as a

[4]Docket No. R-469, issued January 8, 1973.

result of the issuance of the order either before the decision or after.

That is not to say that the order is without influence on the decision. A policy statement is a statement of how the Commission will exercise its discretion. *Attorney General's Manual on the Administrative Procedure Act,* f.n. 3, p. 30. It is not governed by the Administrative Procedure Act, see 5 U.S.C. § 553(b), nor is it reviewable under the terms of the Natural Gas Act, *United Gas Pipe Line Co. v. F.P.C.,* 181 F. 2d 796, cert. denied 340 U.S. 827. It can not validly contravene either the record or the statute, but may foreclose unnecessary argument where the Commission's judgment is capable of exercise in one of two or more ways that the record permits, or where record support for its decision is not required.

The categories of priority set forth in the original policy statement have since been modified, but the basic policy remains in several important respects. As the Commission itself has said, in its Order (dated April 25, 1973) Denying Motions for Reconsideration, etc., of Order No. 467-B,

> * * * The stated priorities are intended to be a safe starting point from which deviations may be made based on an evidentiary record.

B. *Procedure in Special Cases*

The Commission has stressed this emphasis on the evidentiary record. In its original statement of policy, Order No. 467, it said:

> When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented.

This quotation, repeated in Order No. 467-B, issued March 2, 1973, is no empty utterance. Permission was granted to the City of Willcox, Ariz., and Arizona Electric Power Cooperative to show that they should be exempted from the terms of the temporary curtailment plan on the ground that it would be impossible to switch to an alternate fuel as the plan implicitly contemplated.

The claim was heard and decided. It is worth noting that it was decided in the presence of only the few counsel for parties who were interested in this special issue, though all parties were given opportunity to be heard. A separate decision was issued and the rest of the case was in no way delayed. Provision has been made for somewhat similar handling of a special issue raised by Arizona Public Service Corp., Southern Union Gas Co., and Southwest Gas Co.

There is therefore no reason not to issue a decision that fixes curtailment rules as to the matters encompassed by the record or which can be decided as matters of policy (absent any conflict between policy and record), leaving for special treatment any issues that may be raised by a claim that the rules operate unfairly in particular instances or as to particular parties. The broad principles have been established by the policy statement insofar as the record does not conflict with it. There has been opportunity to argue the principles, they have in fact been argued, and decision can properly be made.

C. *End Use and Contract Entitlements*

It is unequivocally the policy of the Commission that priority shall depend primarily upon the nature of the end use of the gas rather than on contract entitlements. The reason is

> * * simply because contracts do not necessarily serve the public interest requirement of efficient allocation of this wasting resource.

This quotation, which the Commission used in Order No. 467, is from *Arkansas Louisiana Gas Company,* Opinion No. 643, January 8, 1973, and was echoed in *United Gas Pipe Line Company,* Opinion No. 647, January 12, 1973.

Despite the arguments of numerous parties, nothing in the record limits the Commission's policy preference for end use, rather than contract provisions, as a basis for curtailment.

San Diego Gas & Electric Company, a customer of El Paso's customer, Southern California Gas Company, points out that Southern California Gas was required to curtail its customers to some degree virtually throughout 1971 and substantially for years before that. San Diego urges that the quality of service that is called for in the various service agreements be considered in apportioning cuts at this time. Specifically, it objects to pro rata curtailment of industrual loads on the ground that it would deprive California customers of their right to demand their daily contract volumes, so that they would be paying demand charges for gas they cannot demand. The E-O-C customers, if they are to be cut by equal percentages of their volume requirements, would feel no such burden because they pay no demand

charge. Furthermore, El Paso's two California customers have a 91% minimum bill provision in their contracts.

It may be conceded that the financial burden of curtailment does not fall evenly if like users are given like treatment. But the converse is true as well. Users would not be even-handedly treated as to supplies if financial considerations alone are to govern. The Commission recognized this in Order No. 467 when it said:

> In determining our priority-of-service listing, we are cognizant of the economic impact that will flow from that listing.

It nevertheless chose end use as a basis, on the ground that customers with like uses should be treated as a class "to avoid any undue discrimination or preference among them." It does not bar all discrimination among such customers, but it bars putting some of them ahead of another class and others behind.

This is in effect a decision that ordinary financial impact, that is, impact common to large classes of users, is a consideration secondary to that of end use. It does not mean that a user on whom the impact is such as to warrant special treatment must go unheard. As has been seen, provision is made for exceptional cases, but the general rule holds.

The choice of end use as a criterion also means that the priority system should be based on the use of the gas at the burner tip. To regulate local distribution is, of course, beyond this Commission's jurisdiction, but there is no reason why it should not regulate El Paso's sales according to the way the gas is ultimately used. This necessarily will involve ascertainment by El Paso of the ultimate disposition of its gas.

The choice of end use points up a deficiency in the Ransom plan, which is a plan put forward by certain E-O-C parties. Under this plan, California and east-of-California areas would share ratably in curtailment. Such a geographic division is arbitrary. A user should not receive either more or less gas merely because he is in one place instead of another. Curtailment should be proportionate within the priority that is being curtailed rather than being assigned by localities according to their total takes. California accounts for about two-thirds and E-O-C one-third of the system's volume. It does not follow that curtailment should be in these proportions. The use of the gas is what counts.

The Ramsom plan also is defective in that it would give higher priorities for gas used to generate electricity for domestic purposes than for other purposes. This approach has already been rejected by the Commission, see *Arkansas Louisiana Gas Co.*, Opinion No. 643, pars. 35-36, and would be rejected by the Presiding Judge even were it a matter of first impression. It would be impossible to assess the social values of the products made by the users of El Paso gas and to award priorities accordingly.

The question is not what products should be favored by providing gas for their manufacture but rather where the burning of gas can most usefully be cut. This involves such decisions as the best place to use a substitute, the environmental effect of substitution, the relevance and force of contractual arrangements, and other matters considered herein. To go beyond the end uses of the gas to the end uses of the products made with its energy is wholly impractical. Limiting the use of gas as boiler fuel does not imply a judgment as to the social value of the boiler, or of the ultimate product of the process of which the boiler is a part.

D. *Boiler Fuel*

Curtailment is primarily a matter of transportation and of allocation of the available supply. Finances, rates and contracts are secondary considerations, though they may be important. In *Michigan Consolidated Gas Co. v. F.P.C.*, 203 F. 2d 895, 900 (C.A. 3, 1953) it was said that "The problem of the allocation of service to various customers is one which calls for judgment within the Commission's peculiar and expert competence."

The City of Willcox, Arizona, argues that there is no record fact to support the judgment that boiler fuel is an inferior use. None is necessary. The Commission has sufficient expertise to know that this is an inefficient way to use gas. It has previously condemned the use of gas to generate electricity where alternate fuels could be used. *South Georgia Natural Gas Co.*, Docket No. CP71-167, Opinion No. 627, Sept. 21, 1972, ... F.P.C. ..... It may, and does, take notice of the fact that to burn natural gas to make steam in boilers so as to convert its inherent energy into electricity or mechanical energy loses about two-thirds of the heating value of the gas used. It is a reasonable exercise of judgment to hold this inefficiency unacceptable in times of shortage. And the Commission may draw on its knowledge of the industry to find, as it has found, that those who use gas as boiler fuel can usually switch to substitute fuels more readily than householders or small commercial establishments, and to find also that when they do so they can install pollution controls more praticably than can other type of user. *Arkansas Louisiana Gas Company*, Opinion No. 643, *supra*.

The statements made in par. 46 of Opinion No. 643, given in outline in the preceding paragraph are here

adopted as part of this decision, not as matters of record but as matters of official notice.

For purposes of this decision, boiler fuel is defined as natural gas used as a fuel for the generation of steam or electricity, including the utilization of gas turbines[5] for the generation of electricity. *United Gas Pipe Line Co.,* Docket Nos. CP73-117 *et al.,* Order issued March 8, 1973, p. 7.

E. *Firm and Interruptible*

In one respect the Commission has drawn a distinction based on contract provisions. Order No. 467-B, Docket R-469, the latest of the statements of policy on curtailment, sets forth nine levels of priority, the last four of which are interruptible requirements of various magnitudes. The basis for this is outlined in *Arkansas Louisiana Gas Co.,* Opinion No. 643, *supra,* p. 9, and 643-A, issued April 10, 1973. It is that interruptible sales are generally to customers who can either switch fuels or do without, and that curtailment should fall first upon those who historically have paid less than the full costs of providing service and who do not need uninterrupted service for the protection of life or property.

The State of California objects to the priorities listed in Order No. 467-B on the ground, among others, that it discriminates against California users because of the special provisions of California regulatory policy.

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[5]In 1970 the national average heat rate for fossil-fueled steam-electric plants was approximately 10,000 Btu per net kwh, *National Power Survey,* Part I, p. 5-7. The corresponding figure for gas turbine generating units was 12,500 to 15,500 Btu per kwh, *Id.* p. I-8-5. (The higher figure indicates less efficiency). It is therefore appropriate to include turbines in this classification. See also Docket No. R-474, Notice issued March 26, 1973, proposing, *inter alia,* this definition of boiler fuel.

In California, a customer for industrial service in excess of 200 Mcf daily is required to maintain alternate fuel facilities. The State claims that insofar as Order No. 467-B downgrades interruptible and alternate-fuel-capacity customers it unfairly disadvantages those California users who are prevented by State policy from becoming firm customers.

As the staff correctly argues, the traditional option of choosing interruptible service at a lower rate has not been available there. The fact that these California users have contracts of a particular type need not reflect the intensity of their need for gas. There is no reason to put them into a different class from, say, Nevada Power, to the extent that both use gas for boiler fuel to create electricity, even though Nevada Power's contracts with its supplier are to a large extent firm.

The result of these considerations is this: that buyers whose use is similar fall, in the first instance, into the same class. Within that class, it is reasonable to have priorities that reflect existing contractual relationships to the extent possible. In this regard the arguments put forward by Pacific Gas & Electric Company and others are appealing. Patterns of reliance that are woven into the whole web of contractual relationships should not be ignored. Similar industrial uses may be either senior to or subordinate to other types of use, but among themselves contractual considerations may properly govern. The public interest requires subordination of boiler-fuel use. It does not require that all boiler-fuel users be treated alike. After the superior uses are taken care of, no purpose is served by shifting boiler-fuel gas from one user to another in disregard of El Paso's contracts. The same reasoning holds as to like industrial uses other than boiler fuel.

Where El Paso has a firm contract with a distributor, this contract should protect the customers of that distributor against curtailment as long as gas flows to buyers whose use is the same as that of the distributor even though the gas does not reach them via a firm contract between El Paso and El Paso's customer. That is, if a distributor has a firm contract with El Paso and sells on an interruptible contract for boiler fuel use, the second contract should be treated as firm for purposes of allocation of priorities.

Otherwise, El Paso's customer, though having a firm contract, would find its receipts of gas being cut as though the contract were interruptible. This would cause hardship to the California customers because of the demand charge and minimum bill features of their contracts with El Paso, which have already been alluded to, see p. 11, *supra*. They would be curtailed while remaining liable to El Paso. It is therefore provided that a firm contract with El Paso shall cause that gas to be treated as firm, whatever the nature of any subsequent contracts for it.

This does not put any use ahead of any other. It merely provides that gas that is the subject of a firm contract will, for priority purposes, be treated as firm, while gas which is for a like use but which is the subject of interruptible contracts all the way from El Paso to the burner tip will be treated as interruptible. It does not, of course, affect the highest priorities such as residential, where the priority is not dependent on the nature of the contract.

In this way El Paso's normal relationships with its customers will be protected so far as the public interest permits. This is admittedly not the priority the Com-

mission had in mind in Order No. 467-B, but this situation was not there envisioned. This record, because of the differences in historical contractual development between California and E-O-C, does not support identical treatment among all boiler-fuel users.

What is done here is not a contradiction of the 467-B priorities, but rather a recognition that in the light of this record weight should be given to the historical differences. The Commission itself gave various priorities to the same type of use depending on whether the user's contract was firm or interruptible.

It is therefore ordered that "firm industrial requirements for boiler-fuel use * * * where alternate fuel capabilities can meet such requirements", *i.e.*, priorities 5 and 6 as fixed below, p. 28, shall include, *inter alia*, all gas for that use sold by El Paso under firm contracts. Like treatment shall be given to gas sold under priority 3. It is emphasized that this is based on the peculiarities of this record and that it is not intended as a precedent for situations where the use of this approach would result in remote ultimate users deriving an unreasonable advantage over identical users who buy directly from a pipeline under interruptible contracts.

F. *Commercial Loads*

The Commission's policy statement, Order No. 467-B, gives highest priority to residential and small commercial requirements, and defines small commercial as less than 50 Mcf on a peak day. Nothing in this record supports the 50 Mcf cut-off point. The staff witness selected that point without giving any reason for the selection, and he and staff counsel explicitly limited this portion of his testimony to the interim period now covered by Opinion No. 634.

There is, however, sound basis for fixing the cut-off point at 200 Mcf per day at least as to commercial loads and perhaps as to all loads. Southern Union's Vice-President, Mr. Oran L. Haseltine, testified that there are some industrial customers who are so small that to curtail them would be "an extremely difficult problem logistically and a rather meaningless exercise." He said that anything below a 200 Mcf per day range would be a virtually noncurtailable load and certainly should not be subject to the first stages of curtailment. It seems obvious that the same would be true as to commercial customers.

That this is a reasonable cut-off point is also indicated by the regulatory policy followed by the State of California. As previously noted, customers in that state who use over 200 Mcf per day are required to maintain alternate fuel capabilities, and are interruptible. For purposes of this decision they are being treated as firm, since they buy gas that El Paso sells as firm gas to Southern California Gas or Pacific Gas & Electric. All of the E-O-C commercial users also buy under firm contracts, either of their own or of their supplier.[6] Therefore, fixing the cut-off at 200 Mcf per day will result in all commercial users being treated alike throughout the system.

G. *Navajo Tribal Utility Authority*

This authority, a creation of the Navajo tribe with approval of the Secretary of the Interior, claims that El Paso's commitment to furnish 15,000 Mcf per day should not be reduced because (1) the consideration for the commitment was the grant of rights-of-way and

[6]If there are exceptions to this, application may be made for extraordinary relief.

easements to El Paso across tribal lands and (2) reduction of the commitment is an unconstitutional taking of property without due process.

Neither argument has force. The commitment was made, and the consideration was given, after the passage of the Natural Gas Act and subject to its provisions. The Act applies to all interstate transportation of natural gas. No subsequent private contract can override the Commission's functions or oust its jurisdiction.

The Commission may require rational curtailment arrangements even though they cut across existing contracts. *F.P.C. v. Louisiana P. & L. Co.*, 406 U.S. 621, 644-5. It has authority, within Constitutional limits, to modify or proscribe contractual agreements that contravene the public interest, *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). Those limits are not transgressed here because, as the staff points out, the tribal agreement envisioned the Commission's regulation of deliveries and was made in the light of a statute the constitutionality of which is not challenged.

H. *Environmental Issues*

From the beginning of the hearings and for some time thereafter the Presiding Judge was under the impression that the Commission's order fixing the procedures for treating environmental questions in certificate cases[7] would apply also to curtailment cases such as this. If they did not apply, there were (and are) no rules fixing procedures for environmental issues in curtailment cases.

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[7]Order No. 415 and Rules of Practice and Procedure Secs. 2.80 and 2.82. Section 2.82(d) provided in part that "The applicant, staff and all intervenors taking a position on environmental matters should offer evidence for the record in support of their position * * *".

The Presiding Judge recognized that while it was not yet a decided matter whether the staff was required to present environmental evidence in a curtailment hearing, Rule 2.82 sets up reasonable procedures and he ordered them to be followed here. Specifically, on January 27, 1972, he ordered that El Paso present a witness in support of its previously-served environmental statement, that staff take a position and present evidence on the environmental impact of El Paso's proposal and that other parties taking positions on environmental matters serve environmental statements and prepared testimony by certain dates.

Staff counsel had stated (R. 3535) that staff did not plan to put on an environmental case because the personnel in the Commission's Office of Environmental Quality (now headed by Dr. Richard F. Hill, a University of Wisconsin Ph. D.) were "assigned for use by the Commissioners themselves" and were not available to testify. He explained that the people handling environmental matters in the Bureau of Natural Gas were "simply persons who were in that Bureau in various capacities prior to this time, but are not qualified as environmental experts", neither the personnel nor the funds to procure outside experts were available (R. 3538).[8]

The Commission reversed the Judge's order to the staff. By order issued March 6, 1972, it ruled that he had exceeded his authority in directing the staff to pro-

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[8]It is possible that he was misinformed. About three weeks after he made his statement Mr. Robert M. Jimeson of the Commission's Office of the Advisor on Environmental Quality and Mr. Alexander Gakner, head of the Section of Environmental Analysis of the Commission's Bureau of Power, presented a paper on air pollution controls before a convention in Dallas. *Paper No. 27a, 71st National Meeting, American Institute of Chemical Engineers, Dallas, Tex., Feb. 20-23, 1972.*

duce evidence. It recognized his belief that the situation was one in which staff evidence was particularly appropriate and perhaps absolutely necessary, but it held that his order had supplanted "counsel's discretion to select his own line of argument or theory of the case". It further held that Section 2.82 of the Rules of Practice, on which he had relied, is inapplicable to curtailment proceedings.[9]

A week later, on March 13, 1972, the Los Angeles Air Pollution Control District (APCD) moved that the Commission suspend the proceedings until the adoption of rules, and for the preparation by staff of an environmental impact statement. On March 16 it also renewed its motion to the Judge to strike El Paso's revised environmental impact statement filed December 31, 1971.

The Presiding Judge denied the motion to strike on April 6, 1972, in an effort to abide by the Commission's order and at the same time produce a record in conformity with the National Environmental Policy Act. He stated (R. 5785):

> Since the Commission has held its Rules to be inapplicable to this type of proceeding the question is not whether the environmental statement of El Paso is sufficient or insufficient under the Rules, but rather whether the record as a whole permits a decision that complies with the National En-

[9]On December 18, 1972, the Commission issued Order No. 415-C modifying Section 2.82 so as to comply with *Greene County Planning Board v. F.P.C.*, 455 F. 2d 412 (C.A. 2, 1972), cert. den. .... U.S. .... (1972). The modification still excludes curtailment cases, but requires staff to present an environmental impact statement in certain other cases. Thus the expertise which would be available for other types of cases would remain unavailable for cases like this one.

vironmental Policy Act. In my opinion this question can best be decided after the record is complete and after the briefs are in.

Therefore, the motion is denied.

Five months later, in an order dated August 22, 1972, the Commission denied the APCD's March 13 motion to terminate the proceeding and to require staff to prepare an environmental statement. In so doing, it stated its reasons why environmental impact cannot be assessed in a curtailment case. It said that the procedures of Section 102(c) of the National Environmental Policy Act (NEPA) cannot be applied to a plan that covers a situation that is merely contingent, not actually existent. The degree, length and locality of the curtailment, future atmospheric conditions and the end uses of the flowing gas, were all described as variables not measurable in advance, as were the kind and amount of substitute fuels forced into use by the curtailment. It spoke of

> "* * the impossibility of complying with the procedural requirements of Section 102(2)(c) of NEPA either prior to or after an evidentiary hearing * *" (Aug. 22, 1972, slip order, p. 6).

It declared that "* * NEPA requires us to consider environmental issues in this curtailment proceeding," but ruled that NEPA's procedures would not be followed.

Thus, in substance and effect it held that although NEPA applies, the Commission's rules do not. As previously noted, it had held earlier that the Presiding Judge may not require the staff to put on an environmental case subject to cross-examination. It evidently considers this case different from *Calvert*

Cliffs Coordinating Committee Inc. v. U.S. Atomic Energy Commission, 449 F. 2d 1109, (C.A.D.C., 1971), since here it holds that no detailed environmental statement by the staff need be considered at the hearing stage.

It evidently also distinguishes *Greene County Planning Board v. Federal Power Commission, supra,* in which the Court of Appeals for the Second Circuit required that the Commission issue its environmental statement prior to any formal hearings. Presumably, the distinction is that *Calvert Cliffs* and *Greene County* are not curtailment cases. The Presiding Judge considers himself bound by the Commission's orders, and accordingly follows them here. The Commission's August 22 order pointed out that environmental evidence would be presented by any party so desiring, and said:

> * * The process of analysis of environmental issues will be embodied in the Examiner's initial decision, and will be considered by the Commission, together with all relevant evidence in the record, before it issues its decision in this and other curtailment proceedings.
>
> * * In this proceeding the Examiner has given detailed attention to seeing that a full record would be developed concerning all environmental issues. There is no reason to assume that the analysis set forth in his initial decision will be any less complete than his interest was in developing the record. (Id., pp. 8-9).

In the same order, however, p. 4, the Commission said:

> In proceedings involving the justness and reasonableness of proposed curtailment plans, the pipe-

line company cannot supply an analysis of the potential impact its plan will have on the quality of the human environment. Nor can this Commission.

The Commission considered that analysis unnecessary because the Commission's mere approval, rejection or modification of the plan itself can have no environmental effect in the absence of actual curtailment. But the situation has since changed. Curtailment of El Paso's deliveries has become an existing fact. The Commission by order dated September 1, 1972, directed that the record be reopened and hearings be held to establish emergency rules for the heating season just passed and issued an opinion and order setting the rules, Opinion No. 634, October 31, 1972. It did this without making an analysis of the environmental impact of the curtailment, though it had held in its August 22, 1972, order that such impact cannot be measured, or even identified, absent an actual curtailment situation. The record for Opinion No. 634 was in substance identical with the present one,[10] and the curtailment with which it dealt was no longer contingent, but present. The Commission held on rehearing of Opinion No. 634 that it "will continue to expect, however, the development of a complete environmental record in the hearings on El Paso's permanent curtailment plan * *." Opinion No. 634-A, Dec. 15, 1972. By that time, as the record before the Commission showed, the environmental record was complete.

Thus the Commission has held that in the present case (1) an environmental analysis must be made (2)

[10]Since Opinion No. 634 was issued there have been minor additions related to special stuations not considered in this decision.

it cannot be made by the Commission or by the pipeline because of the large number of variables and unknowns, (3) the Presiding Judge may not order the staff to put on a case and (4) his analysis will be embodied in his initial decision.

The staff argues that the record does not permit an accurate assessment of the environmental effect of any curtailment plan, either at any one time or over a period. Although it undertakes virtually no analysis of the record, one must admit that closer examination leads to the same conclusion.

The record shows that climatic conditions in the Los Angeles air basin are such that air pollution potential is high and that Los Angeles County consistently exceeds (*i.e.*, violates) the standards of air quality set forth by the Federal and State governments. This applies particularly to the contaminants, such as sulfur dioxide, that are the result of burning fuel oil.

The APCD argues that other areas can reduce air pollution by instituting more rigid controls. Undoubtedly, Los Angeles has a severe air pollution problem, but the record shows like problems in other areas, and that steps are being taken there for better control of pollutant emissions from the burning of fuels. Much of the Los Angeles problem comes from automobiles, and nothing in this curtailment plan can change that.

The record leaves open the question whether air quality can reasonably be used as the standard by which to curtail gas supply, or even whether (and if so, to what extent) it can be used as one factor in setting up such a standard. The APCD's suggestion that California's share of El Paso's gas be raised by giving it an "environmental priority", ranking ahead of any

other industrial use, would not only place the entire curtailment burden on the other states but would seem intended to shift to them a part of California's present pollution problem. Staff's argument that the APCD's proposal falls foul of the Clean Air Act of 1970, 42 U.S.C. § 1857 need not be decided. The proposal is unjust and unreasonable from the viewpoint of the Natural Gas Act alone.

This is not to say, however, that California deserves no consideration on environmental grounds. The record simply is not complete enough to say what that consideration should be, if any.

The E-O-C customers, too, have presented evidence on the subject. That of Dr. Helmut Frank, a witness fo Tucson Gas & Electric, tends to show a greater conversion cost from natural gas to oil, taking into consideration both the higher fuel cost and the cost of equipment. There is evidence that oil costs are more than 50% higher in the Tucson area than near the California refineries. There would, moreover, be extensive and expensive cross-hauling of fuels, with Texas gas going through Arizona to California and California fuel oil moving to Arizona. Dr. Frank concluded that from the viewpoints of economics, environmental damage and pollution abatement, the total costs of curtailment would be minimized if curtailment, accompanied by appropriate pollution abatement efforts, took place in California.

Although staff put on no environmental witness except in connection with the establishment of emergency rules,[11] and although it presented no environmental

[11]A staff witness was called in the reopened proceeding, but the testimony he offered on environment consisted of less than a dozen lines, all of it related solely to emergency rules. It is discussed below, page 32.

statement, staff counsel did cross-examine opposing witnesses. Staff's brief, however, does not rely on any environmental evidence so elicited, but instead points out the futility of any attempt to predict the impact of curtailment on air quality. Among the difficulties it mentions are some of those very problems on which an expert staff witness testifying from an impartial viewpoint, might have been expected to shed light.

It would perhaps have been of interest had the staff been able to present a computer study showing (1) a fuel price schedule for each grade of fuel in the areas using El Paso's gas (2) a fuel use schedule showing the amount of each grade of fuel used in each area (3) a supply schedule showing the amount of each grade available to each area and (4) a control schedule showing the degree to which each area uses anti-pollution precautions, such as, for instance, low-sulphur fuels or stack gas controls. From this, the response of fuel supply, demand and prices to various air quality requirements could have been shown.

This is no doubt only one of many such studies that could have been presented in an effort to show the effect of curtailment on the lungs and pocketbooks of the populace. In ordering the staff to present evidence, the Presiding Judge did not intend to, and did not, confine counsel to any particular line of argument or theory of the case. The study suggested might on cross-examination have turned out to be useless, or might have shown how the costs of the energy needs of the different areas would be affected by air quality requirements. This particular type of study is mentioned merely because Mr. Robert Jimeson of the Office of the (F.P.C.'s) Advisor on Environmental Quality was co-author of a somewhat similar study covering

the entire United States, prepared for a meeting of the Mexican Society of Cost Engineers held at Mexico City, October 29-November 1, 1972. The possibility of obtaining like data for the territory served by El Paso gas appears not to have been examined. It may be that staff's plea of incompetence was overly modest.[12] The Presiding Judge, however, is constrained by the Commission's ruling to agree with it.

Nevertheless, the Commission's attention is respectfully invited to the following portion of the opinion of the Court of Appeals for the Fifth Circuit in *Alabama Gas Corp. v. F.P.C.*, ... F. 2d ...., No. 72-1475, Feb. 7, 1973, because of its recency and apparent pertinence. The Court said (slip op., p. 17):

> The mandate of the NEPA on federal agencies is that they comply with the procedural duties imposed by the Act to the fullest extent possible. See *Calvert Cliffs Co-ord. Com. v. United States Atomic Energy Com'n.*, D.C. Cir., 1971, 449 F. 2d 1109, 1114-15. As there noted, the legislative history of the NEPA interprets 'to the fullest extent possible' to mean compliance unless compliance would give rise to a violation of statutory obligations.

Although the court held there that compliance with NEPA would prevent due execution of the Commission's duties under the Natural Gas Act, no such time pressure exists here as existed there. Consequently, the quoted paragraph seems fully applicable. No one has

[12]No adverse inference should be drawn from any of the foregoing as to either staff counsel or the present General Counsel. Staff counsel was obviously following orders. The present General Counsel was not in the relevant chain of command at the time of the Commission's orders mentioned in this subsection.

suggested here that compliance with NEPA's procedures (*e.g.*, production of an environmental impact statement) would prevent the Commission from carrying out its statutory obligations.

The brief of the APCD reaches the conclusions that the Commission should have suspended the hearings to permit preparation and circulation of an impact statement by the Commission staff, and that the Commission should adopt adequate procedural rules to implement the requirements of NEPA. No decision is made here as to the merits of these contentions. They cannot be accepted because they are addressed to the wrong forum. The Commission has already ruled against them, and the Presiding Judge is bound by its rulings.

Staff's review of the record demonstrated to its satisfaction that "to the extent possible a complete environmental record has been developed." It finds that the environmental effect of a curtailment plan cannot be calculated either as of any one time or over the long term. It argues that the air quality of the more polluted areas served by El Paso's gas would not be appreciably affected even if more natural gas were available.[13] (A question perhaps more basic to the case is the effect of *less* being available.) It concludes that environmental factors do not warrant revisions of El Paso's proposal, that "any attempt to quantify the environmental impact on the El Paso service area would be abortive," and that in any event if an emergency

[13]Staff's derivation of this statement is dubious, as the Air Pollution Control District points out in its brief. The record fails to show some of the figures on which the conclusion rests, and tonnage figures for unlike contaminants have been added together.

arises the pipeline can alleviate the condition temporarily and the Commission will no doubt grant relief if necessary.

The Presiding Judge concurs. Examination of this record, which is the most complete record he has been empowered to produce, gives no reason to suppose that environmental considerations in the area served by El Paso gas, viewed from an overall standpoint, can be so quantified as to produce usable results. Staff in its initial brief points out that the proposals of the various parties do not solve the basic problem but rather "seek to further the self-interests of their proponents."

The latter comment can probably be applied to virtually any plan except the staff's in virtually any proceeding. It was to courteract such narrowness of viewpoint that the Presiding Judge would have required evidence from an expert capable of viewing the entire El Paso situation as a witness devoted to the broadest public interest. In the absence of such evidence and in the absence of an environmental statement by the staff (and cross-examination on it), it would appear that the staff has done as well as it can. Its conclusions as to environment are therefore accepted in every particular.

I. *Priorities*

It follows from all of the foregoing that the following order of priorities for curtailment is just and reasonable:

(1) Residential, small commercial (less than 200 Mcf on a peak day).

(2) Large commercial requirements (200 Mcf or more on a peak day), firm industrial requirements for

plant protection, feedstock and process needs, and storage injection requirements of customers of El Paso.

(3) All firm industrial requirements not specified in (2), (5) or (6).

(4) All interruptible industrial requirements not specified in (7), (8), (9) or (10).

(5) Firm industrial requirements for boiler-fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(6) Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler-fuel use where alternate fuel capabilities can meet such requirements.

(7) Interruptible requirements of more than 300 Mcf per day, but less than 1,500 Mcf per day, for boiler-fuel use, where alternate fuel capabilities can meet such requirements.

(8) Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day), for boiler-fuel use, where alternate fuel capabilities can meet such requirements.

(9) Interruptible requirements of more than 3,000 Mcf per day, but less than 10,000 Mcf per day, for boiler-fuel use where alternate fuel capabilities can meet such requirements.

(10) Interruptible requirements of more than 10,000 Mcf per day, for boiler-fuel use where alternate fuel capabilities can meet such requirements.

J. *Administration of Plan*

On this record, the calculation of deliveries to users in a priority that is to suffer partial curtailment should be based on historical use rather than on contract limi-

tations. As to California, one basis is substantially the same as the other because takes have been substantially at maximum contract levels. The E-O-C customers, meaning both the distributors and direct-sale customers, have had their requirements served 100%, but the contracts have not regularly been changed as the requirements changed. To base curtailment on contract limitations would therefore produce unrealistic and inconsistent results. To base curtailments on actual use makes unnecessary many petitions for extraordinary relief which would otherwise be filed.

In calculating California's use of El Paso's gas, allowance must be made for the fact that the two California distributors are partial-requirements customers. Hence, in accounting for the end use of El Paso's gas, a particular use would be attributable to El Paso in the same proportion that deliveries of El Paso gas to the distributor in the base period bears to deliveries of all gas to that distributor in that period.

Thus, the partial requirements buyer's base period use of El Paso gas within the lowest priority for which El Paso has any gas available is to be calculated by multiplying his requirements in that priority by his total base period takes from El Paso and dividing the result by his total base period takes from all suppliers. This will show what part of a partial requirements customer's load in a priority being curtailed is supplied by El Paso. To put it another way, it ascertains what part of El Paso's deliveries to such a customer goes to a particular priority.

An issue arose as to whether the customer's deliveries to its own storage facilities (and withdrawals therefrom) should be taken into account in the for-

mula. It is found and concluded that they should not. It is incorrect to look upon storage withdrawals as a source of supply or upon deliveries to storage as though they were sales. Storage is a method of equalizing deliveries, permitting supplies to be made available during times of peak demand by filling storage fields at other times. The formula need not allow for it because, absent any contrary indication in the record, it is to be assumed that El Paso gas will go to and from storage in the same ratio that it bears to the total supply.

When supplies of gas are insufficient for El Paso to meet its customers' requirements, curtailment shall take place in the reverse order of priorities listed in the preceding subsection. No curtailment shall be imposed upon any class unless lower classes have been curtailed 100%. "Requirements" means the amounts of deliveries that El Paso would have scheduled during any particular time period but for curtailments. The terms "residential", "commercial", "industrial", "firm and interruptible service", "plant protection", "feedstock gas", "process gas", "boiler-fuel" and "alternate fuel capabilities" are as defined by the Commission in Docket No. R-474 as those definitions may appear from time to time, except to the extent that any proceeding for extraordinary relief in the instant docket, RP72-6, may make them inapplicable.

Historical deliveries to any particular class of priority shall in the first instance be deliveries of El Paso's gas to that class during each of the twelve months ended June 30, 1973. Each month thereafter El Paso shall ascertain the amount of deliveries in each class during the preceding month, and beginning September 1, 1973, it shall begin to administer curtailments, if

any, on the basis of deliveries during the same month of the year before.[14]

Of course, since curtailment is to go by end use, El Paso must curtail not only the volumes delivered to its own customers for use in the affected priority class but also deliveries to resale customers relative to the resale customers' sales in that class. This makes it necessary to ascertain end use delivery patterns and to update that information regularly.

El Paso shall therefore obtain such information from its customers not later than one month after the end of the month covered, that is, June figures are to be reported by July 31. A customer's refusal or neglect to furnish the information at the proper time shall cause deliveries to that user to be classified in the lowest priority. Any user seeking individualized consideration of his position may petition the Commission for special treatment, such petition to be made in this docket.

A sharp issue arose between the California and E-O-C parties as to whether curtailments, if based on historical use, should go by the average day of the year or by the peak day in determining what proportion of El Paso gas available for a particular priority should go to a particular customer. The California customers, whose use varied little throughout the year, favored an average-day criterion, while the E-O-C interests naturally wanted their proportion of the available total to be measured by peak days. The method here prescribed, *i.e.*, the daily average of the same month of the previous year, will not satisfy the par-

[14]The record is bare of evidence on whether this allows enough time for the collection, tabulation and application of the figures. No doubt exceptions will be taken if it does not, and they will presumably be given due consideration.

ties' claims or desires but will avoid the maximum damage that either group's suggestion would have caused the other.

It is expected that this regular revision of the basis of priorities will encourage sales in the highest priorities. Several of the intervenors have urged that uses be stabilized, primarily with the idea of preventing further cuts in industrial uses. This would not be sound policy.

There is no reason to deny companies the right to add residential business. Such a denial would create an elite class of residential consumers on the basis that they got there first, and would rank the others below boiler-fuel users. Our limited supplies are better used by large numbers of small users, where pollution control is hard to effect and hard to police, than by a few large users where the reverse is true. If residential use is superior to others, the more gas diverted to it the better. It is just and reasonable to prefer residential use, where substitution of fuel is difficult or impossible, over industrial use where the customer is buying gas as a matter of economic preference.

Certain intervenors argue that such a policy contravenes Section 7 (a) of the Natural Gas Act which, they say, prohibits impairment of adequate service to existing customers. They cite *Granite City Steel Co. v. F.P.C.*, 320 F. 2d 711 (C.A.D.C., 1963).

The prohibitions of Section 7(a) bar the Commission from compelling a pipeline to make a new connection or new sales, or to enlarge its transportation facilities, when to do so would impair its ability to render adequate service to its customers. Here Section 7(a) is not involved. This is not an order to make a connection or a sale or to enlarge any facilities. It

merely permits what has always been permitted, namely, the growth of residential use.

The *Granite City* case is wholly inapposite. There the Commission had ordered the reallocation of a portion of the capacity of a pipeline by directing the pipeline to sell to certain of its utility customers gas which it had been delivering to its direct industrial customers. No such order is made here. The pipeline's customers are permitted to seek high-priority business, as they always have been. They are not compelled to, they are simply not barred.

As the Commission has said, *Granite City* does not detract from the Commission's authority over curtailments, *United Gas Pipe Line Co.*, 46 FPC 786, 798. It is Section 4 of the Act, not Section 7, that deals with service, and the Commission may rely on it to deal with curtailments, regardless of whether Section 7 is also applicable. *Louisiana Power & Light Co. v. F.P.C.*, 406 U.S. at p. 646.

An issue is raised as to special treatment for an emergency air pollution situation. The staff witness recommended that when an air pollution episode reaches the emergency level as designated by the Environmental Protection Agency and as declared by an air pollution control agency, "the gas curtailment may be waived to the maximum extent possible." He said:

> * * The air pollution control agency should be required to certify to the interstate pipeline that all corrective intrastate and interstate redistribution of gas has been taken within the state before such waiver is implemented.

Cross-examination showed lack of clarity as to what authority, if any, exists to require an agency to make such a certification and precisely what is meant by "all corrective . . . redistribution of gas". What length of time might elapse before the certification could be obtained was never stated, though time is obviously an important consideration in emergency circumstances.

Cross-examination also showed that the staff's intention was to give El Paso the right to waive curtailment in the emergency, to the extent that gas might be available. Whether the Commission can properly delegate the right to waive, and where the pipeline would get the additional gas, were questions which had apparently not been considered.

It is ordered, as an environmental emergency provision, that any Federal, State or local agency having jurisdiction over pollution control be permitted to apply to this Commission for diversion to its area, for the duration of an existing emergency, of gas going to other areas under priorities other than (1) and (2). The agency shall apply jointly with the user or users to whom it is proposed to divert the gas. The application shall show the nature and extent of the emergency, the extent of the proposed user's current curtailment and any plans for the return of the emergency gas at the end of the emergency.

Another issue relates to the future handling of additions to the supply of any of the partial requirements customers. The arithmetic of the formula is such that if a customer adds to his resources he would not receive

the full benefit of the addition but would share it with those who have done nothing. Certain parties are understandably concerned that such a result may flow from continued application of the formula. The matter is not really in issue, since it concerns only a future contingency, but is raised rather as a caveat to keep present remedies from being applied rigidly to future ills.

It seems best to write no prescription for future use now. It may be that to continue the formula would work unfairness. On the other hand, it may be that to give the customer the full benefit of his added resources would result in his supplying a certain priority level at a time when a higher level is being curtailed as to some other user. Whether that would be the result, and if so whether it is compatible with the public interest, are questions better left for future decision as circumstances then appear.

Mr. Arthur Markus, a witness for Johns-Manville Products Corp., suggested that all boilers on the system be ranked by size, with the smaller receiving the high priorities. The idea has some attractiveness, but its administration is likely to be cumbersome and it has other defects as well. For instance, to allot priorities boiler by boiler would not only be complex to the verge of impracticality but would tend to reward a user for keeping in use the smaller and presumably less efficient boilers. Furthermore, as Tucson Gas & Electric Company contends, a plant containing six boilers can be served from a common alternate fuel storage source and each

can be vented through a common pollution abatement device. A single plant is the smallest practicable basis for allotting priorities.

Certain parties raise a question as to compensation to be given by one user or group to another as the result of gas being diverted by the curtailment plan. The issue has no place here. As to the direct sales and other non-jurisdictional transactions, the Commission has no jurisdiction over rates, and gains none by virtue of the plan. Whether jurisdictional rates should be changed is a matter appropriate to a rate case, in which much evidence not in this record would be needed.

All electric utilities are granted a special examption from curtailment to the extent required to avoid the shedding of firm electric load for residential and commercial use and for industrial requirements for plant protection upon an attestation by the utility that (1) it faces an emergency that will require it to shed firm loads for these uses unless an exemption is granted (2) it has no alternate fuel capabilities (3) it has exhausted all purchased power opportunities and all alternative power sources and (4) it will accept reduced deliveries as soon as possible to offset the volumes taken during the exemption.

ORDER

It is ordered that

(1) El Paso shall within 60 days file revised tariff sheets in accordance with this decision.

(2) The record shall remain open for purposes of the hearing set for June 14, 1973, on the issues raised by Arizona Public Service Corp. *et al.*, as to the grouping of delivery point obligations for purposes of the permanent curtailment plan, and any matters related to those issues.

(3) The record shall remain open for purposes of the decision to be rendered on the petition of the City of Mesa, Arizona, for extraordinary relief, and for matters related to that decision.

(4) The record shall not be reopened for other purposes except on order of the Commission.

(5) El Paso shall file monthly with the Commission tabulations of the data received as to the use of its gas and as to deliveries, curtailments and curtailment exemptions for the month ended not more than sixty days prior to the filing.

/s/ Arthur H. Fribourg
Arthur H. Fribourg
Presiding Administrative Law Judge

In the Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1772, 73-1776, 73-1790, 73-1825

SOUTHERN CALIFORNIA GAS COMPANY, ET AL.,
PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

Petitioners [1] challenge the validity of orders of the Federal Power Commission (Pet. App. 54-69) [2] es-

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[1] The petitions in Nos. 73-1790 and 73-1825 were filed out of time. The judgment of the court of appeals was entered on January 21, 1974. Petitions for rehearing were denied on February 25, 1974. The time within which to file a petition for a writ of certiorari expired on May 26, 1974, and no extensions were granted. (May 26 was a Sunday, and May 27 was a legal holiday.) The petition in No. 73-1790 was filed on May 29, 1974, and the petition in No. 73-1825 was filed on June 3, 1974. This Court therefore lacks jurisdiction over those petitions (28 U.S.C. 2101(c)). We accordingly address ourselves in this response only to the contentions of the petitioners in Nos. 73-1772 and 73-1776.

[2] "Pet. App." refers to the appendix to the petition of Southern California Gas Company, No. 73-1772.

tablishing an interim plan, pending further proceedings to establish a permanent plan, for the curtailment of natural gas deliveries, during periods of shortage, to customers of El Paso Natural Gas Company, a large interstate pipeline. The court of appeals, in an opinion that fully and accurately states the facts and background of the case, affirmed the orders in part but remanded the case to the Commission for further consideration with respect to several matters (Pet. App. 1-53). The interim plan has thus not yet been finally approved by the court of appeals. The plan will, in any event, soon be superseded by the permanent plan, which was prescribed by the Commission on June 14, 1974.[3]

The Commision's interim plan established a schedule of priorities for allocating gas supplies when El Paso's deliveries must be curtailed. Those priorities were defined in terms of the "end use" of the gas to be delivered—*i.e.*, whether the gas was destined for residential, commercial, or industrial consumption. Petitioners Southern California Gas Company (SoCal) and Pacific Gas and Electric Company (PG & E), both California distributor-customers of El

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[3] The Commission's opinion and order prescribing a permanent curtailment plan are set forth in the appendix to Southern California's reply brief (No. 73-1772), pp. 1-54. The permanent plan will take effect, according to the terms of the order, upon the issuance of a final order on the petitions for rehearing presently pending before the Commission (*id.* at 43).

The opinion on the permanent plan also constitutes the Commission's opinion on remand with respect to the interim plan (*id.* at 8-9).

Paso, contend that the interim plan unjustifiably interfered with their contractual rights to purchase gas from El Paso and improperly "shifted" gas supplies from one group of customers to another.

This Court rejected similar contentions in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621. The Court held in that case that the Commission "may order pipelines facing shortages to develop and submit rational curtailment arrangements" and may permit "the pipeline's tariff amendments to take effect despite contrary terms in existing contracts" (406 U.S. at 646). The Court also made clear that "the Commission would have emergency authority to issue interim orders effecting a curtailment plan" (*id.* at 644, n. 18).

Contrary to petitioners' assertions, nothing in the Court's opinion suggests that the Commission's emergency authority to prescribe a curtailment plan is limited to providing for "the demands of human-needs customers" (SoCal Pet. 11). Where the Commission finds that a pipeline's existing tariffs are discriminatory, it is obliged to prescribe just and reasonable tariffs to eliminate *all* aspects of the discrimination. The Commission here found that, under El Paso's existing tariffs, service to all of its residential, commercial, *and* industrial customers located east of California would be curtailed before *any* service to California customers would be curtailed. It accordingly found the plan to be "discriminatory and violative of Section 4(b) of the Natural Gas Act" (Pet. App. 60).

In eliminating that discrimination, the Commission reasonably concluded that, in a time of severe natural gas shortage, the contractual expectations of *all* users are necessarily frustrated and that the resulting burden should be spread as equitably as possible (see Pet. App. 17-18). An "end use" plan which fairly allocates the available supply among the ultimate users of the gas is not invalid merely because one or another distributor receives less gas than its contract with the pipeline might call for in a period of relatively plentiful supply. As the court of appeals correctly stated, "the Commission is not bound by agreements among parties subject to its jurisdiction" (*id.* at 18) where the result would be unduly discriminatory.

Petitioner PG & E, relying on the decision in *International Paper Co.* v. *Federal Power Commission*, 476 F. 2d 121 (C.A. 5), argues (Pet. 10-12) that the Commission failed to make essential threshold findings to justify its conclusions that allocating gas in accordance with existing tariffs would be unduly discriminatory and that requiring the pipeline to allocate gas without regard to contractual preferences would be in the public interest. As the court of appeals correctly stated, however, *International Paper* is inapposite.

> [T]he twin findings mentioned in the *International Paper* opinion are only required for the purpose of exonerating a pipe line from liability for breaches of contract which may result from compliance with Commission orders. The peti-

> tions now before us do not concern the remedial rights of the pipe line and its customers *inter sese*, but the authority of the Commission to override a contractually arranged curtailment plan. On the latter question, the statute leaves no doubt. The only preliminary finding required by the statute is that the former plan was discriminatory, a finding clearly expressed in Opinion 634. [Pet. App. 20; footnote omitted.]

Petitioner SoCal also claims that "[t]he Commission had no substantial evidence upon which it could conclude that there was any real danger to the residential and commercial customers east of California" (Pet. 17). The court of appeals found, however, that "the Commission's prediction of severe [east-of-California] curtailments under the former plan is supported by substantial evidence" (Pet. App. 28) and that "the evidence does sustain the conclusion that peak day curtailment would, at minimum, cause the complete shutdown of [east-of-California] direct industrials and substantial reduction of service to [east-of-California] commercial customers while California service remained undisturbed" (*id.* at 29).[4] Petitioner has not shown that the court of

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[4] At the same time, the court found that the record did not support a finding that east-of-California *residential* customers would have suffered curtailment under the former plan. It accordingly authorized the Commission on remand "to modify its orders accordingly, subject to further review by this Court" (Pet. App. 29). We assume, therefore, that petitioner PG & E's present claim relates only to the Commission's findings concerning commercial customers.

appeals "misapprehended or grossly misapplied" the substantial evidence standard. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491; *Mobil Oil Corp.* v. *Federal Power Commission*, No. 73-437, decided June 10, 1974, slip op. 23.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

LEO E. FORQUER,
General Counsel,
Federal Power Commission.

SEPTEMBER 1974.

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